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*For Mr. Griffin*  
*Printed*  
HEARINGS

BEFORE THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

OF THE

HOUSE OF REPRESENTATIVES

ON

H. R. 10431, 6273, 6768, 7640, 10008, 11434, 11594,  
13778, 12767, 15600, 16301

TO AMEND THE INTERSTATE-COMMERCE LAW.

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HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE OF THE HOUSE OF REPRESENTATIVES ON THE PROPOSED ENLARGEMENT OF THE POWERS OF THE INTERSTATE COMMERCE COMMISSION.

FRIDAY, December 9, 1904.

The committee met at 11 o'clock a. m., Hon. W. P. Hepburn in the chair.

STATEMENT OF MR. E. P. BACON.

Mr. BACON. Mr. Chairman and gentlemen of the committee—  
The CHAIRMAN. Mr. Bacon.

Mr. BACON. I appear before you in behalf of the commercial organizations of the country representing various branches of trade and of industry, to the number of 424, of the committee representing which I have the honor to be chairman, for the purpose of urging that the legislation which has been before Congress for so long a time, the amendment of the interstate-commerce act for the purpose of giving it effectiveness by enlarging the powers of the Interstate Commerce Commission, be expedited to the utmost possible extent. The legislation has now been before Congress for five years, having first come through the bill known as the Cullom bill, which was introduced in December, 1899, and failed of passage. That was a Senate bill and was reported to the Senate adversely by a majority of 1, and failed of action in that Congress. In the next Congress the committee which I represent secured the introduction of a modified bill.

I will say in the first place that this committee advocated the passage of the Cullom bill during that Congress, but in the next session a modified bill was presented, in view of the fact that a number of the provisions of the Cullom bill were seriously objected to by one and another.

The CHAIRMAN. Let me interrupt you. The bill that you referred to as the Cullom bill was the one that contained the provision authorizing pooling?

Mr. BACON. That did not contain any provision authorizing pooling. I will come, very shortly, to the bill that did contain that. The bill that succeeded that, which was advocated by this committee, was known as the Nelson-Corliss bill, and it contained less than half of the provisions previously contained.

Mr. RICHARDSON. The Nelson-Corliss bill?

Mr. BACON. The Nelson-Corliss bill, introduced in the Senate by Senator Nelson and by Mr. Corliss in the House, he being a member of this committee at that time. That contained less than half of the provisions contained in the other. At the same time the Elkins bill was



introduced in the Senate. That was in 1901, the first session of the Fifty-seventh Congress, that bill having been prepared directly and drawn personally by the general counsel of the Pennsylvania Railroad, Mr. Logan, who is now dead. That bill, together with the Nelson-Corliss bill, was before the Senate at the same time, and a duplicate of that bill was subsequently introduced in the House in the latter part of the same session of Congress. That bill contained a pooling clause, and it was before the Senate during that Congress, and the final result was that simply one section of that bill was reported, with some modification, which was passed, and which is known as the Elkins act, which provided extreme penalties for the violation of the prohibitions of the interstate-commerce act against individual discriminations.

Mr. ESCH. What kind of discriminations?

Mr. BACON. Individual discriminations—discriminations between individuals and corporations. But it had no bearing whatever upon discriminations between localities or between different descriptions of traffic. That portion of the bill was passed and has been productive of immense good. It has been surprising, in fact, to me to what an extent that bill has been complied with by the transportation companies, and in fact our committee has been unable to trace any violation of that bill of any consequence. There have been some devices for defeating it by the establishment of side tracks, which are called railroads, so that on a division with the railroads they get an undue proportion, and by that means obtaining personal discriminations, personal favors, and personal advantages. But the Commission, after hearing some cases in that direction, have already taken steps to prevent that evasion of the law.

In the present Congress, the first session of the present Congress, our committee secured the introduction of a bill based upon the Elkins bill. The Elkins bill, I will say, in addition to having been framed by the general counsel of the Pennsylvania Railroad, was amended at the suggestion of our committee by the counsel and the amendment approved by President Cassatt, and our committee then adopted it as a substitute for the Nelson-Corliss bill and joined with the railways to secure its passage. But on the failure of that bill our committee in the next Congress—that is, the first session of the present Congress—secured the introduction of what is known as the Quarles-Cooper bill. It is simply a redraft of the revised Elkins bill, revised as I have described, and eliminating the pooling section. That bill contains a pooling section, drawn with great care, putting all rates fixed by pools or the Traffic Association under the direct supervision of the Interstate Commerce Commission. But the commercial organizations of the country almost unanimously disapproved of pooling. Very few of them favored it and others favored the establishment of traffic associations without, however, the pooling provision. But a great majority, probably nine-tenths—more than that, in fact—are opposed to pooling, and are opposed to the application of pooling in any form, even in the form of traffic associations. Consequently that was considered in redrawing the bill and presenting it in its present form.

That is one of the bills now before this committee. Extensive hearings were held on the Nelson-Corliss bill in April, 1902, this committee devoting some two or three months to its consideration, the commercial organization side of it having been presented in about three weeks, during the month of April, and hearings held open for nearly

two months for the railway side to present their views in relation to it. The best talent, probably, of the railway systems of the country appeared before this committee and presented their objections to the bill, through Mr. Hines, counsel for the Louisville and Nashville Railroad; Mr. Grover, counsel for the Great Northern; Mr. Blythe, counsel for the Chicago, Burlington and Quincy, and Mr. Bird, who was vice president and traffic manager of the Chicago, Milwaukee and St. Paul Railway, and appeared in behalf of the Northwestern roads in general. So that the subject appears to have been exhaustively presented before the committee on both sides.

The committee which I represent does not desire to present anything further in the case on its side but desires, on the other hand, that the bill be expedited to the utmost possible extent and holds that any further hearings, in its judgment, are wholly unnecessary on either side. However, we do not assume to dictate to the committee as to whether they are satisfied with the hearings or not. But so far as we are concerned we waive any claim to further hearings and desire to aid in every way in expediting the legislation. We feel that the subject has been so long before Congress and we have expended so much time in the advocacy of it and in the solution of the question, before Congress and before the committees of Congress and before the public, that it is time we reached some definite result; either that the matter should be disposed of by dropping it or that it be pushed to a successful issue. That is all, gentlemen, that I wish to offer this morning.

Mr. CUSHMAN. What is the name of this organization that you represent?

Mr. BACON. It is the interstate-commerce law convention.

Mr. CUSHMAN. When was it organized?

Mr. BACON. The first convention was held in November, 1900, and a second convention in last October. The first convention appointed an executive committee, of which I had the honor to be chairman, and that committee proceeded under the general instructions of that convention during the interval between that and the second convention, a period of nearly four years, and at the second convention the executive committee that had previously represented the organization was reappointed, with the exception of some of the members, who were excused or were dropped, and some new members appointed.

Mr. CUSHMAN. Will you state, in a general way, what the general purposes of the organization are?

Mr. BACON. The sole purposes of the organization—it is hardly proper to call it an organization, because it was merely a convention of representatives or delegates from the various commercial organizations of the country. The first one held at St. Louis in November, 1900, consisted of delegates from only 41 commercial organizations.

Mr. CUSHMAN. What are the purposes of the organization, primarily, that you represent?

Mr. BACON. The purposes of the commercial organizations or of this interstate-commerce law organization.

Mr. CUSHMAN. The purposes of the convention.

Mr. BACON. The purpose of that convention was to secure the amendment of the interstate commerce act for the purpose of giving it greater effectiveness, by means of enlarging the powers of the Interstate Commerce Commission.

Mr. CUSHMAN. How many conventions have you held?

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Mr. BACON. Only two conventions; one in 1900 and one in 1904.

Mr. CUSHMAN. How many attended the first convention?

Mr. BACON. I think the number present at the first convention was about seventy, representing about forty or forty-one commercial organizations.

Mr. CUSHMAN. And how many were present at the second convention?

Mr. BACON. At the second convention there were present 306, representing 170 commercial organizations. In the meantime, there has been correspondence going on on the part of this committee, which was appointed by the first convention, with all the various commercial organizations of the country, presenting the matter for their consideration, and one after another has joined in the movement by the passage of resolutions favoring the proposed legislation and urging their representatives in Congress to advocate it.

Mr. CUSHMAN. Now, does the work of your convention, or your delegates, your organization, consist chiefly in presenting the views of commercial organizations that are sent to you?

Mr. BACON. That is it, exactly; yes, sir. The commercial organizations act through this committee.

Mr. CUSHMAN. Is a part of the work of your committee to help create sentiment in favor of this legislation?

Mr. BACON. It might, perhaps, be so regarded. The effort has been to ascertain the sentiment of commercial organizations, and to suggest that such of them as favored this legislation join in the effort to promote it.

Mr. CUSHMAN. I receive a good deal of literature in my mail, from various organizations—*independent organizations*—which seems to have emanated from one source. It does not seem to be always an independent expression of the views of the different people, but the signatures seem to be affixed to something that has been presented to them for signature.

Mr. BACON. This committee has not issued anything of that character. It has suggested to the commercial organizations with which it has had correspondence that if they desire this legislation they should take the matter up in their own way with their respective Representatives in Congress, and that has been done to a very large extent.

Mr. CUSHMAN. You are aware, are you not, that there are a number of new members on this committee who have never been present when this subject has been on for hearing before this committee?

Mr. BACON. I am aware of that; yes, sir. I understand that there are seven new members.

Mr. ESCH. Does this organization represent all parts of the country, geographically speaking?

Mr. BACON. They represent every part of the country. They represent organizations located in 44 different States and Territories, covering all branches of trade. There is not any one branch that seems to be any more interested in it than another. It originated with the milling interests six years ago, through the National Millers' Association, and it was followed in the first place by a convention that was held at Chicago in 1899 by representatives of national commercial organizations who indorsed the Cullom bill and recommended its passage to Congress, and that convention was followed by the first interstate commerce law convention in the following year.

Mr. ESCH. Are these constituent bodies confined to shippers and manufacturers, or have you also bodies which represent consumers and the consuming class, which ultimately pay the tax?

Mr. BACON. These organizations represent either mercantile bodies or manufacturing bodies, these bodies representing manufacturing organizations, but at the same time the State granges of several of the States have taken independent action in relation to it, and have added their influence in the effort to secure the legislation; but our organization represents solely the commercial interests—mercantile manufacturing interests.

Mr. RICHARDSON. Have you not also brought under your organization a number of what are commonly known as chambers of commerce?

Mr. BACON. Yes, sir; those are classified among commercial organizations.

Mr. RICHARDSON. And they represent farmers and merchants, and so you have all those kinds of men as members?

Mr. BACON. They generally represent only business men. In some instances the chambers of commerce do represent professional men.

Mr. RICHARDSON. They are from mercantile bodies, but they represent not only merchants, but they bring all classes of people together.

Mr. BACON. To some extent; but they consist principally of merchants and manufacturers. The State grangers' association, the Patrons of Husbandry, you understand, of course, is a purely agricultural organization representing farmers. They constitute a membership, I am informed, of about 500,000, and they have for years, from year to year, taken action urging this legislation.

Mr. RICHARDSON. You do not pretend to say that all those other classes of people are not as much interested in the question of unjust freights?

Mr. BACON. I do not say they are not just as much interested. In fact, I believe the consumers are more interested than any other class of people. And producers, also. They are directly affected by the rate of freight on their products from the points of production. The consumers, of course, are interested in all that they consume, and, in fact, commercial organizations are only indirectly interested, because what they pay in freight is passed over immediately in the price of their goods to those who use the goods, or, in the case of agricultural products, is taken right out of the price of the product which the farmer offers for sale.

Mr. CUSHMAN. I recently received in my mail a communication setting forth that some number of people and institutions, 12 or 13, I believe, who have heretofore approved of this legislation, now withdrew from your organization and wished their names to be stricken off of the petition. Do you know anything about that?

Mr. BACON. There is only one case that has come to my knowledge, and I think if there were others they would have come to my knowledge. That was in reference to a purely private organization, and not in relation to a commercial organization at all. A publishing organization in New York was engaged in publishing a journal entitled "Freight," a monthly journal. In obtaining subscriptions to their journal they used the name of the Merchants' Association of New York as having indorsed this legislation, as was the case. They were among the first who advocated the legislation, and among the most active. The officers of the association objected to that private organization using its name in their solicitation of

subscriptions, and very properly; and the directors of that organization, at the solicitation of the president of one of the railways terminating in New York, wrote to this publishing company, who, in connection with obtaining subscriptions for their paper, also circulated a petition on their own account, and without the knowledge of our organization, for this legislation, which they sent around the country together with their paper for signatures. These merchants in New York, who had been appealed to by the president of this railway, requested the publishers of this paper to withdraw their signatures from the petition they had signed. That petition had no connection with this association or this movement. It was a purely private matter, and that effort was undoubtedly made for the purpose of promoting their private enterprise.

Mr. CUSHMAN. Are you engaged actively in any kind of business at this time that does large shipping?

Mr. BACON. I am engaged in the grain business, as I have been for forty years, in the city of Milwaukee, in the receiving of grain on commission. I am not a shipper. I receive grain on consignment and sell it for the shippers, returning to them the proceeds, of course. But in the payment of freight charges on that business, the great injustice of freight charges attracted my attention, and naturally, for my interest, with those with whom I was doing business, I took up the subject, endeavoring, so far as I might be able to do so, to produce a rectification of these difficulties and injuries.

Mr. BURKE. Who issued the call for the first convention, held in 1900?

Mr. BACON. The call for that convention was issued by the executive committee of the previous convention that I spoke of, which was held in 1899, of the national commercial organizations of the country, which was termed "The League of National Associations." I was chairman of the executive committee of that organization.

Mr. BURKE. That was in 1900?

Mr. BACON. That was in 1899.

Mr. BURKE. In 1899. And that convention was held on call issued by you?

Mr. BACON. That convention was held upon call issued by the National Millers' Association. The National Millers' Association had been at work for a year or two endeavoring to secure legislation, owing to the discrimination between rates on wheat and flour.

Mr. BURKE. What connection had you with that association?

Mr. BACON. I had no connection with that association; but after working for a year or two alone to accomplish it, they deemed it best to secure the assistance, if possible, of other national organizations, theirs being also a national organization. So they called a convention at Chicago, which was held in November, 1899, at which the Cullom bill was taken under consideration, before its introduction, and was indorsed by that convention; and it appointed an executive committee, of which I was made chairman, to press the legislation. And Mr. Barry, who is here at my side, was the secretary of that convention. He was previously secretary of the National Millers' Association, and this convention held in Chicago in 1899 was followed by the convention held in St. Louis in 1900, and that convention was called by the executive committee of the previous organization; that is, the League of

National Associations, and that association went out of existence when this first St. Louis convention was held; that is, it was superseded.

The St. Louis convention comprised local and State organizations as well as national, which it was deemed necessary to take in for the purpose of making this demand for legislation more general.

Mr. BURKE. Have you ever had any connection yourself with any railway company, in any capacity; and if so, when?

Mr. BACON. Yes, sir. The first fourteen years of my business life was spent in railroad service.

Mr. CUSHMAN. How many years?

Mr. BACON. Fourteen years. I commenced my business career very early. At 17 I obtained a position in a railway office, and remained in the railway service for fourteen years, and then went into business for myself. During that railway service I occupied various positions. During the last nine years of that service I was in the positions, successively, of general freight agent, auditor, and general ticket agent of what was then the Milwaukee and Prairie du Chien Railway, now a part of the Chicago, Milwaukee and St. Paul, and it was probably through that experience that I became interested in these matters. I also took some part in securing the passage of the present interstate commerce act, arising from that interest. I was appointed one of the committee of the National Board of Trade to promote the passage of that act.

Mr. BURKE. When was the Elkins bill enacted? When did it become a law?

Mr. BACON. In February, 1903.

Mr. BURKE. Do I understand you to say that that bill was prepared by the general counsel of the Pennsylvania road?

Mr. BACON. Yes, sir.

Mr. BURKE. And subsequently was amended by some provisions that your committee desired in the bill?

Mr. BACON. Amended by the counsel of the Pennsylvania Railroad at the request of our committee.

Mr. BURKE. And it had your sanction when so amended?

Mr. BACON. Yes, sir.

Mr. BURKE. And it passed in that form?

Mr. BACON. It did not pass in that form. As I remarked a while ago, the only portion of the bill that was passed was the portion prescribing severe penalties for the violation of the provision against individual discriminations, which, as I remarked, has been very effective.

Mr. BURKE. But the amendments suggested by you were not in the bill when it became a law, or those to which you subscribed?

Mr. BACON. No, sir.

Mr. MANN. The original Elkins bill?

Mr. BACON. The original Elkins bill was a comprehensive one, but only one portion of that bill was reported and was enacted.

Mr. RICHARDSON. Relating to what?

Mr. BACON. Personal discriminations.

Mr. RICHARDSON. Was that an original provision?

Mr. BACON. Yes, sir.

Mr. LAMAR. What penalty did it impose?

Mr. BACON. A penalty of \$5,000 fine for each violation.

Mr. LAMAR. That was applied to the corporation and not to the agent in the depot?

Mr. BACON. It was applied to the corporation.

Mr. ADAMSON. That provision was simply taken up and put on as a rider to a bill that went through?

Mr. MANN. No; that was a separate bill. That was a matter that you had been agitating for years, and had been in all the former bills before this committee.

Mr. BACON. It was.

Mr. MANN. And was it a matter that the general counsel of the Pennsylvania Railroad then put in that bill?

Mr. BACON. It was a part of that bill.

Mr. MANN. We had had discussions about that before that Congress convened. It was in all these bills that had been before us, practically all the same thing.

Mr. ADAMSON. Before you arrived at that Senator Elkins did just bring in a separate provision, and it went through?

Mr. BACON. It prescribed the penalty of \$5,000 for the company for each violation of the law, and it inflicted the penalty, which by the interstate-commerce act was put upon the individuals, upon the companies, which had the effect of opening their mouths and making it possible to obtain convictions under the law.

Mr. RICHARDSON. Have you heard of any proceedings against the railroads in the matter of rebates?

Mr. BACON. I have not heard of any occasion for proceedings. It has been so generally observed by the railways since its passage that there has been no occasion for prosecution.

Mr. RICHARDSON. Railways are not opposed to stopping the rebates?

Mr. BACON. Not by any means. It is quite as much to their advantage to stop them as to that of the public.

Mr. BURKE. How much time was consumed in the hearings on this bill in the Fifty-seventh Congress?

Mr. BACON. The hearings were commenced on the 8th of April and were concluded on the 17th of June, a period of over two months.

Mr. BURKE. Now, as I understand, you waive any further hearing?

Mr. BACON. Any further presentation of our side.

Mr. BURKE. And you expect those who are now on this committee to familiarize themselves with the subject by referring to the reports of those hearings?

Mr. BACON. They certainly have opportunity of doing that. We wish, however, in case of any additional arguments being presented by the railway side, to have an opportunity for rebuttal. That will be all we will ask for.

In referring to my having had some part in the passage of the original interstate-commerce act, I was going to add that that is what led me to give a good deal of study to this matter, and to read up the cases and to keep close observation on the results of the operation of the act, and also on the court proceedings in cases of appeals.

The CHAIRMAN. Were you at that time in favor of the legislation that was enacted, or were you in favor of the other series of propositions that were contained in what was known as the Reagan bill?

Mr. BACON. I favored the interstate-commerce act as it was finally reported and passed.

The CHAIRMAN. Now, did you ever hear, during all of that contention, or in any of the speeches that were ever made in Congress, any claim made that that gave to the Interstate Commerce Commission the

power to fix a rate, and is there to your knowledge anywhere in the debates or anywhere else a sentence that seems to maintain that position?

Mr. BACON. Mr. Chairman, the fact that the Supreme Court has decided that question it seems to me renders it wholly irrelevant.

The CHAIRMAN. No, it does not because it is claimed by many people, and I think by you, that the power has been taken away from the Commission by the Supreme Court. What I want to get at now is this: Did you ever hear, can you produce a sentence, from anyone participating in any of those debates that seems to indicate that they believed that the power was given at that time to fix rates?

Mr. BACON. The time has passed so long that I do not recall at the present moment.

The CHAIRMAN. Did you believe at that time that the power was given?

Mr. BACON. The question at the time of the passage of the act did not enter my mind.

The CHAIRMAN. No. You never thought of it, did you?

Mr. BACON. I simply took observation of it as the Commission acted in pursuance of the law, that it did convey the power of changing rates.

The CHAIRMAN. In any other way than the way of recommendations?

Mr. BACON. Yes, sir; in the way of positive orders; and those orders were recognized and acquiesced in by the railroads.

The CHAIRMAN. In how many instances?

Mr. BACON. Well, I can recollect. [After a pause.] I would be pleased to go into that later. Mr. Cooper is here, and I know he would like to say a few words to you about the bill.

The CHAIRMAN. One other question that I want to ask you. You say that you are engaged in creating public sentiment in favor of this bill. How do you do that?

Mr. BACON. I do not say that.

The CHAIRMAN. You did say that, I think.

Mr. BACON. I do not think I used the word "create." I said that my effort had been simply to ascertain the extent of the prevailing public sentiment and to develop it.

The CHAIRMAN. As a matter of fact, you and your colaborers, you and Mr. Barry particularly, do attempt to create public sentiment in favor of this matter?

Mr. BACON. That has not been the intention of our committee at all. It has simply been—

The CHAIRMAN. You do go to the extent of denunciation of members of Congress who you think do not favor it, also?

Mr. BACON. Our committee has never done anything of the kind, or anything that could be so construed.

The CHAIRMAN. Has not anyone else?

Mr. BACON. No, sir; not that I know of.

The CHAIRMAN. Has not your friend, Mr. Barry?

Mr. BACON. Not during his employment by us. Not when he was engaged by the committee.

The CHAIRMAN. Has he not during the last summer, to your knowledge?

Mr. BACON. He has not been employed by the committee during the last summer. With the close of the last Congress we had no need of



his services. Just before the opening of this session we reengaged him. In the meantime he has been in the employ of one or two organization, which have been seeking the same legislation; the Interstate Cattle Growers' Association, for one.

The CHAIRMAN. How many salaried officers are there in connection with this—

Mr. BACON. With this movement?

The CHAIRMAN. With this movement.

Mr. BACON. No one but Mr. Barry, who is employed as secretary.

The CHAIRMAN. What is his salary?

Mr. BACON. His salary while employed by the committee has been \$250 a month.

The CHAIRMAN. And his expenses?

Mr. BACON. His expenses in traveling?

The CHAIRMAN. Was there not a fund raised at your last meeting for the purpose of agitating this question?

Mr. BACON. For the purpose of publishing matter relating to it, and enlightening the public as to the progress in it and as to the purpose of it.

The CHAIRMAN. And there is no compensation paid in any way to any person save Mr. Barry?

Mr. BACON. Not a dollar in any way, shape, or manner. On the contrary, the members of the committee have gone to a good deal of individual expense on their own account. The members of the committee are scattered in various parts of the country, and each one is exerting his influence, of course, in his particular section of the country.

The CHAIRMAN. To what extent, to your knowledge, does the Interstate Commerce Commission or any of its officers aid in the dissemination of your literature?

Mr. BACON. To no extent whatever. We have no connection with the Commission in any way, shape, or manner.

The CHAIRMAN. None of its officers?

Mr. BACON. None of its officers?

The CHAIRMAN. Yes.

Mr. BACON. Except occasionally we have consulted with them as to the desirability of certain provisions of the bill.

The CHAIRMAN. To what extent does your committee, or do members of your committee, use the offices and the employees of the Interstate Commerce Commission in the dissemination of your literature or for your other purposes?

Mr. BACON. In no way whatever, sir. [Retiring in favor of Mr. Cooper.]

The CHAIRMAN. I would like to pursue this matter a little further. We can hear Mr. Cooper at a later period. Have you considered the provisions of this bill, which is pending, in their relation to all of the public interests, in your judgment?

Mr. BACON. We have certainly sought to do so.

The CHAIRMAN. You have sought to do so?

Mr. BACON. Yes, sir.

The CHAIRMAN. Have you considered it in the relation that it bears, or is claimed to bear, to a disturbance of the powers between the three coordinate branches of the Government?

Mr. BACON. We have had no occasion, that I am aware of, to go into the constitutional question. I do not know that the question of the constitutionality of this bill has been raised by any of the opponents of the bill. The several distinguished railway attorneys who appeared before the committee offered no suggestion to that effect, so far as I—I am sure they did not. I was going to say that so far as I observed, they did not; but I have read their testimony over and over very carefully, and I am sure that they did not. Hence I did not think it necessary to deal with it.

The CHAIRMAN. The bill you advocate proposes to confer legislative power upon an executive branch of the Government, does it not?

Mr. BACON. It proposes to confer a delegated legislative power upon the Interstate Commerce Commission.

The CHAIRMAN. You understand that to be a part of the executive branch of the Government, do you not?

Mr. BACON. I hardly regard it as such, Mr. Chairman. The members of the Commission are appointed by the President, individually; but he has no control over them; no direct control—is not connected with any department of the Government.

The CHAIRMAN. Its duties are solely executive at the present time, are they not?

Mr. BACON. It hardly seems so to me.

The CHAIRMAN. It does not?

Mr. BACON. It seems to me that they are, perhaps, probably, of an administrative character. Whether that would properly be termed executive or not I can not say.

The CHAIRMAN. Have you entered into the question of whether or not there is any power of review by any court of any act of the Commission, that it might perform through this grant of power to fix rates?

Mr. BACON. The bill specifically provides for a review by the circuit court upon application of the carrier?

The CHAIRMAN. But for what purpose? What question would the court review? You are familiar with all this subject, I take it; you have been six years constantly engaged on it.

Mr. BACON. The bill specifically states that the court shall review it with respect to its lawfulness.

The CHAIRMAN. With respect to the lawfulness of the rate?

Mr. BACON. With respect to the lawfulness of the order. It says that their orders shall be subject to the review of the court as to their lawfulness, reasonableness, and justice.

The CHAIRMAN. That would involve the question as to whether their rate was a reasonable rate.

Mr. BACON. That would be, I think, for the court to determine.

The CHAIRMAN. Have not the Supreme Court of the United States specifically refused to pass upon any question of the reasonableness of rates?

Mr. BACON. The Supreme Court has decided that it has no power to pass upon rates to be adopted in the future.

The CHAIRMAN. Have they not decided further, have not the Supreme Court held, that the only question in connection with rates that they can pass upon is as to whether or not a given rate is an act of confiscation, and that they have nothing to do with whether a rate is reasonable or not?

Mr. BACON. I have not so understood the rulings of the court.

The CHAIRMAN. You have not?

Mr. BACON. But the Federal courts have, as you know, at various times passed upon that very point, as to whether the proposed rate, or a rate proposed by a State railway commission, was confiscatory in its effect, or would be confiscatory in its effect.

The CHAIRMAN. Yes.

Mr. BACON. They overruled the orders of the State commissioners on the ground that they were of that nature.

The CHAIRMAN. Yes; that they were confiscatory?

Mr. BACON. Yes, sir.

The CHAIRMAN. But have they not refused to pass upon any other question than that of whether the rate was confiscatory? Deciding as to the mere reasonableness or justice of a rate they hold to be a legislative act, and outside of the jurisdiction of the court, do they not?

Mr. BACON. They hold that a rate for the future is outside of the jurisdiction of the court; that it can not pass upon a rate for the future.

The CHAIRMAN. That is your understanding of the matter?

Mr. BACON. That is my understanding.

The CHAIRMAN. And your advocacy of this bill is based upon that idea, that the court has the power to pass upon a question of the reasonableness of rates?

Mr. BACON. No; I could not say that it was based upon that; it is based upon the necessity, which is manifest, that some tribunal should decide between the public and the companies in cases of dispute as to the reasonableness of rates.

The CHAIRMAN. You would still advocate the passage of this bill, even if you knew that the courts would not pass upon the action of the commission in the fixing of a rate?

Mr. BACON. I do not go as far as that, Mr. Chairman. I feel, or at least I have thought, that those were matters for the court to determine for itself.

The CHAIRMAN. But suppose they should so hold, would you still be in favor of the bill?

Mr. BACON. The court has held that the Commission in this case, in ordering changes in rates, has gone beyond the power conferred by the present act. Now, if we confer the power for them to make such changes by the present act, and the court decides that that is unconstitutional, we would have to abide by the result; but we would like to have the opportunity to see——

The CHAIRMAN. Have you discussed those questions?

Mr. BACON. I have not discussed the legal questions themselves very much.

The CHAIRMAN. Have any of those questions been presented to this committee by anybody?

Mr. BACON. The constitutional questions I do not think have been specially presented to the committee. We have presented the requirements of the situation, so far as the commercial organizations are concerned.

The CHAIRMAN. For relief?

Mr. BACON. For relief.

The CHAIRMAN. But you have not considered nor presented the legal aspects of the remedy?

Mr. BACON. We do not seem to have had any occasion to do that, for the reason that the railway opponents of the bill have not suggested any such necessity. I will say, however, that in the testimony presented by the commercial organizations, several of the members—four of the members—of the Interstate Commerce Commission, did go into the question of the legality of this proposition, each for himself. And also Mr. Kernan, of New York, the distinguished lawyer who was four years chairman of the State railway commission of New York, went into it quite thoroughly before this committee.

The CHAIRMAN. You remember that Mr. Prouty stated to this committee that he did not know whether or not this bill was a wise one, do you not?

Mr. BACON. At one time he said that he had not given it sufficient study to determine.

The CHAIRMAN. That was at the time he appeared before this committee, was it not?

Mr. BACON. I could not say specifically, in regard to that; but I know that Judge Prouty, in his testimony, did advocate the bill very strongly, and he has since expressed his approval of it, as have also the other members of the Commission.

The CHAIRMAN. That is all I care to ask for the present.

Thereupon the committee adjourned until Tuesday, December 13, 1904, at 10.30 o'clock a. m.

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TUESDAY, *December 13, 1904.*

**STATEMENT OF MR. E. P. BACON—Continued.**

The CHAIRMAN. Mr. Bacon, are you ready to proceed?

Mr. BACON. Yes, sir; I am ready to answer any questions that may be asked of me.

The CHAIRMAN. Did you intend, by an answer that you made the other day, to say that the Interstate Commerce Commission had not taken an active part in the advocacy of your proposition to give them the power to establish railway rates?

Mr. BACON. So far as the organization which I represent is concerned, they have not.

The CHAIRMAN. Has there been at any time an effort on the part of you or your organization to procure that result?

Mr. BACON. Not in the least; no, sir.

The CHAIRMAN. Were you cognizant of it at the time that the railway commission did, in a former meeting, instruct their secretary to prepare and send abroad a letter advocating, as the views of the commission, this increase of power or grant of power?

Mr. BACON. That I have no knowledge of.

The CHAIRMAN. You have no knowledge of it?

Mr. BACON. I know it is not in connection with this organization which, as you understand, was formed in 1900.

IRMAN. Well, your organization was formed in 1900?

Mr. BACON. Yes, sir; November, 1900.

The CHAIRMAN. But there was another meeting in the year before, out of which it was in part formed, was there not?

Mr. BACON. It succeeded the organization known as the League of National Associations.

The CHAIRMAN. When you speak of your organization, do you exclude the prior organization?

Mr. BACON. I speak only for the present organization.

The CHAIRMAN. Did you have no knowledge of the transactions of the other?

Mr. BACON. I did have some partial knowledge.

The CHAIRMAN. You did have?

Mr. BACON. Yes, sir.

The CHAIRMAN. Did you know, or was it through your advice or procurement, that on the 8th day of December, 1899, the Interstate Commerce Commission made the following order:

Cooperation with certain mercantile organizations to secure the adoption of an amendment to the act to regulate commerce being under consideration, it was unanimously voted to instruct the secretary to cooperate with the representatives of these organizations for the purpose of securing the adoption of necessary amendments, and particularly the passage of a bill which has been approved by such organizations at a meeting held in Chicago on November 22, 1899, and to that end to give the public information as to the present state of the law and the necessity of amending it by distributing such reports, papers, and documents, as are designed to accomplish that purpose, and to devote himself assiduously to such duties.

Did you know of the passage of that order?

Mr. BACON. I do not think I ever saw that order.

The CHAIRMAN. Did you know of its passage?

Mr. BACON. I do not recollect of knowing of it.

The CHAIRMAN. Did you aid in securing its passage?

Mr. BACON. I did not. I knew nothing of it.

The CHAIRMAN. Did you urge in any way, as the representative of your committee, this cooperation on the part of the Commission?

Mr. BACON. I did not; no, sir.

The CHAIRMAN. Were you at that time active in this matter?

Mr. BACON. I was, to some extent.

The CHAIRMAN. Were there other agents of that society then cooperating with you?

Mr. BACON. That can hardly be called a society. It was a convention similar to the one that was held in 1900, composed of delegates from national commercial organizations only.

The CHAIRMAN. Do you know what was the result of that action which I have called attention to?

Mr. BACON. It resulted in pressing for the passage of the Cullom bill, which had been drawn just previously thereto.

The CHAIRMAN. Pressing by whom?

Mr. BACON. I think by one or two members of the Commission; perhaps by several.

The CHAIRMAN. What bill was drawn?

Mr. BACON. The bill known as the Cullom bill.

The CHAIRMAN. Yes, sir; but I am speaking more particularly about the results that followed this action that I have just read.

Mr. BACON. Those results were simply an effort on the part of the organizations associated in that effort to secure the passage of the Cullom bill.

The CHAIRMAN. Do you know anything of the circular letter that was prepared by Edward A. Moseley, secretary of the Interstate Commerce Commission, and disseminated generally, or extensively?

Mr. BACON. I do not recollect any circular that was prepared by him?

The CHAIRMAN. You never saw it?

Mr. BACON. I have no recollection of it. I would not say that I never saw it, positively, but I have no distinct recollection of it. I could not say whether I ever saw it or not.

The CHAIRMAN. Are you familiar with that letter?

Mr. BACON. No, sir. If I were familiar with it I would not say that I had no recollection in regard to it.

The CHAIRMAN. I beg your pardon. When I asked this last question I had not in mind that statement.

Mr. BACON. Mr. Chairman, if I may suggest, it seems to me that whatever action was taken by that preliminary organization the present organization is not responsible for, because it was organized on different lines. The present organization consists of the various State and local organizations in connection with the national organizations that were associated in the original movement; but the present organization succeeded that and proceeded on entirely different and independent lines, and although it did ask and urge the passage of the Cullom bill, which was then in its second session before Congress, subsequent to that session it prepared an entirely new bill, the passage of which it urged, and since that it has prepared still another, each being modified by conditions and circumstances that have arisen during that provision.

The CHAIRMAN. But the same provision, substantially, with regard to the rate-making power, was found in all those bills?

Mr. BACON. That is common to them all; yes, sir.

The CHAIRMAN. Common to them all, and that was the feature of the bill most earnestly urged by the Interstate Commerce Commission, was it not?

Mr. BACON. The Interstate Commerce Commission urged the passage of the Cullom bill which comprised a large number of provisions and was very extensive in its range, and designed to remedy a number of serious defects that have been developed in practice under the interstate-commerce act, and the subsequent bills were very much more limited in their provisions; and the final bill was confined to the particular point of conferring special power upon the Commission, together with preventing discriminations.

The CHAIRMAN. You said the other day—or at least I understood you to state—that the power of the Interstate Commerce Commission to make rates was conceded by everyone for ten years after its formation.

Mr. BACON. I think I made a statement to substantially that effect.

The CHAIRMAN. Do you know that within three months after the Commission was organized, the then chairman of the Commission, Mr. Cooley, expressly declared that no such power had been conferred upon the Commission, that it was utterly impracticable, and that that duty could not be performed? Do you know that he said that in an official capacity?

Mr. BACON. I do not know that he made such a statement as that.

The CHAIRMAN. You do not?

Mr. BACON. I have a memorandum of what was stated by Judge Cooley.

The CHAIRMAN. Do you know that Mr. Schoonmaker, within eight

months after the organization of the Commission, substantially used the same language?

Mr. BACON. No, sir. My recollection is directly to the contrary.

The CHAIRMAN. To the contrary?

Mr. BACON. Yes, sir.

The CHAIRMAN. Do you know that repeatedly, between that time and the decision in the maximum-rate cases, the courts declared that that power did not exist?

Mr. BACON. The courts declared that the power to make rates primarily did not exist in the Commission; and the decision of 1897—

The CHAIRMAN. Yes, sir.

Mr. BACON (continuing). Declared that the Commission had no power to determine what change should be made in a rate which was found to be unjust or unreasonable.

The CHAIRMAN. Yes.

Mr. BACON (continuing). And it declares that its power was limited to the denunciation of the rate and limited to declaring the fact that it was found to be unreasonable or discriminative, as the case might be. On that point I have a paper here which I will read to the committee, which will be of interest—a paper which, I may say, was drawn by the secretary or the assistant secretary of the Interstate Commerce Commission, at my request, in relation to this very point of the position of Judge Cooley.

The CHAIRMAN. You can file that with the committee.

Mr. BACON. I would like to read it.

The CHAIRMAN. I think that it will be unnecessary. It will take up too much time.

Mr. BACON. It will take me only two or three minutes to read it, and it is directly in answer to the question that you have asked me.

The CHAIRMAN. Very well. Who prepared that, do you say?

Mr. BACON. It was prepared at the office of the Interstate Commerce Commission by either the secretary or the assistant secretary. [Reading:]

I know of no case wherein Judge Cooley said that the Commission had no authority to prescribe a reasonable rate when an existing rate had been found to be unreasonable. During all of the time Judge Cooley was on the Commission—

The CHAIRMAN. Whose statement is that, now, if you please?

Mr. BACON. It is that of either the secretary or the assistant secretary.

The CHAIRMAN. Well, who? Which one?

Mr. BACON. I am not quite sure which.

Mr. MANN. It will be quite easy to ascertain, because the secretary of the Interstate Commerce Commission is here.

Mr. MOSELEY. Mr. Bacon, yesterday I got a letter from you stating that a question had been asked you, and asking myself, or the Interstate Commerce Commission, to state what the facts were. I handed the letter to Mr. Decker, the assistant secretary, and this is the first notice that I have had that he did reply to it. It is not that I want to shirk any responsibility, but I say that the letter was handed to Mr. Decker, the assistant secretary, who has been with the Commission since its organization, and if this reply was sent to you it must be the reply sent you by Mr. Decker.

The CHAIRMAN. Is that paper signed by anybody?

Mr. MOSELEY. From the Interstate Commerce Commission, I suppose, and is a memorandum bearing directly on the facts in question.

Mr. LAMAR. Who handed that to you, Mr. Bacon?

Mr. BACON. It was handed to me this morning.

Mr. LAMAR. Who handed it to you?

Mr. BACON. It was handed to me at the office of the Commission.

The CHAIRMAN. Is it signed by anybody?

Mr. BACON. It is not signed and is not addressed. It is a memorandum handed to me.

Mr. LAMAR. Handed to you by whom?

Mr. BACON. Handed to me by the assistant secretary. I think, Mr. Chairman, that in reply to your question I am entitled to present this paper. I beg the privilege of reading it to the committee.

Mr. WANGER. We can adopt this as his answer.

Mr. BACON. I make that a part of my statement. It is as follows:

I know of no case wherein Judge Cooley said the Commission had no authority to prescribe a reasonable rate when an existing rate had been found to be unreasonable. During all of the time Judge Cooley was on the Commission it was believed that the Commission had this authority and he joined in the orders forbidding carriers not to charge more than the reasonable rate shown by the evidence in cases involving that question.

A case decided by the Commission in an opinion by Commissioner Schoonmaker has been cited as holding in 1887 that the Commission had no authority to prescribe reasonable rates. This was the case of Thatcher against the Delaware and Hudson Canal Company (1 I. C. C. Rep., 152). But that case did not involve the reasonableness of rates. The complainant shipped grain from his elevator at Schenectady, N. Y., to Boston and Boston points. He desired that the rates for that service should be less than those from stations on the same line nearer to destination. In other words, he wanted an order compelling the roads to depart from the principle of the long and short haul clause. The Commission said it might authorize the carriers upon their application to depart from the rule of that clause, but that it had no power to compel such departure.

The Commission further said the carriers might reduce the rate from Schenectady and also from the shorter distance points and so avoid making an exception to the long and short haul clause, but added that the complainant did not ask the Commission to compel such a reduction from the shorter distance stations, and that no evidence had been offered which would enable it to determine what would be proper and just rates from such stations. Right in this connection the Commission used the language which has been sometimes referred to as disclaiming the power to prescribe a reasonable rate on complaint. It said, as to rates from the shorter distance stations, concerning which no complaint had been made or any evidence offered: "It is therefore impossible to fix them in this case, even if the Commission had power to make rates generally, which it has not. Its power in respect to rates is to determine whether those which the roads impose are for any reason in conflict with the statute." It was impossible to fix rates from the shorter distance stations, because the Commission had before it no complaint and no evidence, and if it had power to make rates generally, that is, without complaint or evidence, it could not have done so in the absence of some information upon the subject. At that time, if the rates were found to be in conflict with the statute, it was believed that the Commission had authority to prescribe the maximum reasonable charge. In that very case the Commission said:

"If the complainant thinks the rates from Schenectady and intermediate points to Boston and Boston points are excessive, he can raise that question directly and distinctly, and the Commission can then enter upon a full investigation of the facts bearing upon it."

That case was decided in July, 1887. Six months afterwards the Commission, including Judge Cooley, held, in the case of Evans against The Oregon Railway and Navigation Company (1 I. C. C. Rep., 325), that the wheat rate from Walla Walla, Wash., to Portland, Oreg., was unreasonable, and ordered it to be reduced so as not to exceed 23½ cents during the existing grain season, the expectations being that there would be a further reduction for the next season. The decisions of the Commission in other cases showed the exercise of the authority to prescribe maximum reasonable rates in cases arising on complaint up to May, 1897, when the decision of the United States Supreme Court was rendered holding that the statute did not confer that authority upon the Commission.



The CHAIRMAN. Now, let me call your attention to this language of Judge Cooley, and I will then ask you if you are familiar with it.

The Commission would be required to act as rate makers for all the roads, and would be compelled to so adjust the tariffs as to meet the exigencies of business, while at the same time endeavoring to protect relative rights and equities of rival carriers and rival localities. This, in any considerable state, would be an enormous task. In a country so large as ours, and with so vast a mileage of roads, it would be superhuman. A construction of the statutes which would require its performance would render the due administration of the law altogether impracticable, and that fact tends strongly to show that such a construction could not have been intended.

Are you familiar with that language?

Mr. BACON. I think I have seen that before; and I understand that that applies to the general initiative rate-making power.

The CHAIRMAN. Yes, sir. This bill does not contemplate anything of that kind?

Mr. BACON. It simply contemplates the making of a rate——

The CHAIRMAN. Yes, sir.

Mr. BACON (continuing). Which, upon due investigation, has been found to be unreasonable and unjust.

The CHAIRMAN. That is, the action of the Commission must be in response to a complaint to the Commission?

Mr. BACON. Yes, sir; in response to the complaint.

The CHAIRMAN. Yes, sir. Then the jurisdiction of the committee in this particular matter would be dependent upon the character of the complaint?

Mr. BACON. The character of the complaint, and the evidence produced.

The CHAIRMAN. Then if the complaint was enlarged so as to cover a number of roads, the jurisdiction of the Commission would be corresponding to that?

Mr. BACON. There is no doubt, if the complaint embraced a number of different complaints——

The CHAIRMAN. If the complainant was authorized to make a complaint against one rate contained in a schedule, he could with equal propriety complain of all the rates in that schedule, could he not, and make one complaint of it?

Mr. BACON. He could, but I think the Commission would exercise its discretion as to entertaining a case that involved——

The CHAIRMAN. How could it exercise its discretion under this bill if it was to confine its inquiry to the complaint? You have just said that the complaint fixed the jurisdiction under this bill.

Mr. BACON. I have said that the complaint could be filed. I did not say that it fixed the jurisdiction.

The CHAIRMAN. I understood you to say so. That is what I asked you.

Mr. BACON. I did not intend to say so. If I did, it was a mistake.

The CHAIRMAN. Is it not your opinion that under this bill a complainant would have a right to make a complaint against all the rates from all the stations named in a given schedule?

Mr. BACON. I think if such a complaint were made——

The CHAIRMAN. Will you answer that question? Under the bill would he not have that authority?

Mr. BACON. I think I answered substantially the same question in the affirmative.

The CHAIRMAN. That he would have?

Mr. BACON. Yes, sir. But I did say that it would be in the discretion of the Commission whether to entertain such a broad complaint.

The CHAIRMAN. Then you think that under the provisions of this bill, and in the interest of remedying present difficulties, it would be in the province of the Commission to select such parts of a man's complaint as it saw fit to regard as important and exclude others?

Mr. BACON. I think it would be in its province to require that the complaint should be limited to a series of rates that were dependent upon one another.

The CHAIRMAN. To a series of rates?

Mr. BACON. Yes. Rates that had a necessary relation to one another.

The CHAIRMAN. Now, it often happens, does it not, that a particular rate upon one road is largely dependent upon another rate?

Mr. BACON. To be sure.

The CHAIRMAN. To be sure. And it happens that a rate from one locality is very often dependent upon a rate from another locality?

Mr. BACON. One of the principal objects of this bill is to prevent discrimination between those several points that come into competition for business and to establish the proper relations between roads to and from competitive points.

The CHAIRMAN. Then it would be utterly impossible, in the just administration of this law, for the Commission to confine itself to a single rate upon one commodity from one locality, would it not?

Mr. BACON. I would not say that it would be impossible. There might be occasions and situations in which it would be essential that it should be restricted.

The CHAIRMAN. Yes. But it would not suffice for them to say that they would consider nothing but a single rate upon a single commodity from a single shipping place?

Mr. BACON. If the rates which were combined in the complaint had no bearing upon each other and no relation to each other, I think it would be perfectly competent for them to require the complaint to be amended.

The CHAIRMAN. Is it not true, in a certain sense, that every rate is inter-dependent and is related to every other rate in the schedule?

Mr. BACON. That is a pretty broad statement, Mr. Chairman.

The CHAIRMAN. Is it not true?

Mr. BACON. Not by any means.

The CHAIRMAN. It is not?

Mr. BACON. Have you any idea of the number of rates in force in this country?

The CHAIRMAN. I think I have.

Mr. BACON. It would be utterly impossible to say what the relation was.

The CHAIRMAN. You say they have no relation?

Mr. BACON. No, sir.

The CHAIRMAN. They have, certainly, in the contemplation of the railway companies in the matter of surplus earnings, do they not, over and above the operating expenses?

Mr. BACON. Not all the rates in the country.

The CHAIRMAN. The rates of that particular road?

Mr. BACON. The rates of any particular road.

The CHAIRMAN. They do have relation to one another?

Mr. BACON. Yes, sir; certainly.

The CHAIRMAN. And that, too, in an important sense, more or less, to one of the parties to the controversy, to the railroad company, namely?

Mr. BACON. Not of any greater importance to the railroad company than to the public? They have equal interests.

The CHAIRMAN. But they do have that important relation?

Mr. BACON. They certainly do have an important relation.

The CHAIRMAN. What is, in your judgment, the serious evil properly to be complained of relating to railway charges?

Mr. BACON. Well, sir, I should say that there were two. First, there is the relation of rates between competing points, and the relation of rates between competing commodities, all of which are very important.

The CHAIRMAN. They are all in the nature of discriminations?

Mr. BACON. They are all in the nature of discriminations, but beyond that, and of far greater importance, is the general scale of rates throughout the country, which has been raised from year to year during the past four years to an extent that has produced, according to a statement made by the Interstate Commerce Commission, a difference in the charges for the year ending June 30, 1903, of \$155,000,000 in excess of what the rates would have been that were in force in 1899.

The CHAIRMAN. That is, including the volume of traffic?

Mr. BACON. On the same tonnage.

The CHAIRMAN. On the same tonnage?

Mr. BACON. The same rate per ton of 1899, applied to the traffic of 1903, produced a difference of over \$155,000,000 in excess.

The CHAIRMAN. That included the increased traffic?

Mr. BACON. No, sir; it takes the same rate per ton which was applied in 1899.

Mr. CUSHMAN. The same number of tons?

Mr. BACON. The same rate per ton that was in force in 1899, applied to the tonnage of 1903, increases the earnings by \$155,000,000. That is to say, if the tonnage of 1903 was charged at the rates in force in 1899, the revenues derived by the railroads, or the charges paid by the public, were \$155,000,000 greater than they would have been under the rates of 1899. That is the statement of the Interstate Commerce Commission, made to the Senate in response to a resolution of inquiry.

Mr. CUSHMAN. Do you mean that the same rate applied in 1899 applied now to the same number of tons would produce this excess?

Mr. BACON. Not quite so much. The tonnage in 1903 was a little more, but the rate of 1903 applied to the tonnage of 1899 would produce \$155,000,000 more.

Mr. CUSHMAN. That might be a question of increased amount of tonnage.

Mr. BACON. That has no bearing upon it.

Mr. CUSHMAN. Then I do not understand you.

Mr. BACON. I have endeavored to make myself plain.

Mr. MOSELEY. If the rate of 1899 had been in force in 1903 the amount of freight paid would have been \$155,000,000 less than it was.

Mr. BACON. That is it, exactly. And this is a question that concerns the public. One point is very often forgotten—that is, that shippers have no concern as to what the actual freight rate is. Their concern

is that no one else shall have a lower rate than they have and that other places with which they have to compete shall have no discrimination in their favor against them; but the public is concerned in the rate itself. Everything that is consumed, in every form, whether for food or clothing, or heating or building, or for any other purpose whatever, is subject to these rates of freight, and the public are the ones who bear that rate.

The CHAIRMAN. Now, to get back to this matter of the character of the complaints that are made. Is it not true that the great volume of complaint is with regard to some form of discrimination, either in rates, or as to persons, or as to commodities, or as to localities?

Mr. BACON. That is the burden of the complaints, so far as shippers are concerned.

The CHAIRMAN. That is the great burden?

Mr. BACON. No, sir; the shippers are one class and the public are another. The shippers constitute perhaps one-fiftieth part of the public.

The CHAIRMAN. Yes, sir.

Mr. BACON. And as long as their rates are equitable with regard to each other and with reference to the various commodities they handle they are fully satisfied; but they are the ones that make complaints against this particular evil, this evil of discrimination.

The CHAIRMAN. Yes.

Mr. BACON. That is, discrimination between localities and between commodities. But the public at large is making complaint through the press of the country in the most impressive manner, and has been for years. Almost every paper in the country has been burdened with this complaint. But the people have no organization before Congress. They are left entirely to themselves and they are pleading their cause in an indefinite and indirect manner.

The CHAIRMAN. You have been appearing heretofore, have you not, as the representative of the shippers?

Mr. BACON. I am the representative of the shippers.

The CHAIRMAN. The commercial associations?

Mr. BACON. Yes sir; but the shippers naturally feel that they are interested—

The CHAIRMAN. Let me go a little further. So that, so far as your representative capacity is concerned, you are interested in these discriminations, and drawbacks, and things of that kind?

Mr. BACON. That is true. But we shippers—

The CHAIRMAN (continuing). And the people whom you represent, as you have just stated, have but little care as to what the rate is if it is equitable with regard to all of the shippers?

Mr. BACON. That is it.

The CHAIRMAN. That is it. So that when you make these other representations of the complaints of the populace that are voiced in the newspapers, you are getting outside of your official relations to this subject, are you not?

Mr. BACON. I take exception to the term "populist," because they are not embraced in any party.

The CHAIRMAN. I did not say "populist." I said "populace." [Laughter.]

Mr. BACON. I beg your pardon. While the shippers are interested in the rates being properly adjusted, they naturally feel a reciprocal

interest toward those from whom they derive their business, those with whom they are doing business, and when they see that the rates are excessive, and that their customers and clients are suffering unjustly in regard to it, they naturally feel that it is necessary for them to exert their influence as far as it may be necessary to relieve that.

The CHAIRMAN. So that in representing this part of the subject—

Mr. BACON. I am speaking for the public.

The CHAIRMAN. You are speaking emotionally rather than professionally? [Laughter.]

Mr. BACON. Yes, sir.

The CHAIRMAN. I would be glad, Mr. Bacon, if you would tell us in what way legislation is necessary—what new legislation is necessary—in order to remedy this vast number of complaints that are the complaints of the shippers which you have just spoken of?

Mr. BACON. The very legislation which is comprised in the bill which has been prepared through this committee.

The CHAIRMAN. Have they not now legislation which prohibits discriminations between persons?

Mr. BACON. Yes, sir.

The CHAIRMAN. Do they not have legislation which prohibits discriminations between localities?

Mr. BACON. We have legislation which prohibits it, but we have no means of enforcing it. The Commission is absolutely—

The CHAIRMAN. We will get to that after a bit. Do we not have legislation with regard to discriminations as to commodities?

Mr. BACON. There is legislation—that is, there is a declarative statement in an act of Congress prohibiting that.

The CHAIRMAN. Prohibiting that?

Mr. BACON. We are not asking for legislation to prohibit it. We are asking for the means of enforcing that legislation.

The CHAIRMAN. Yes, sir. Now, we have a criminal statute to aid in its enforcement, have we not?

Mr. BACON. Not in its enforcement.

The CHAIRMAN. We have not a criminal statute?

Mr. BACON. Only in regard to personal relations.

The CHAIRMAN. Have we not legislation with regard to discriminations, prohibiting discriminations as to commodities?

Mr. BACON. There are no penalties.

The CHAIRMAN. There are no penalties?

Mr. BACON. No, sir.

The CHAIRMAN. A discrimination either against the person or against the locality or against a rate is forbidden by the law, is it not?

Mr. BACON. It is forbidden that rates shall be discriminative between localities or between commodities, or, as the act expresses it, between different descriptions of traffic; but it ends there.

The CHAIRMAN. And between persons?

Mr. BACON. I left out the persons.

The CHAIRMAN. See if it ends there. I think it does not. Discrimination in either of these respects by a carrier is prohibited, you say?

Mr. BACON. It is prohibited; yes, sir.

The CHAIRMAN. Then it is an offense, is it not, against the statute—a violation of the statute?

Mr. BACON. It is a violation of the statute.

The CHAIRMAN. Have we not a Commission whose duty it is to make inquiry with regard to all violations of the provisions of that statute?

Mr. BACON. We have, and they have made inquiries and have found that violations do occur in many instances, and have attempted to remedy it, without effect.

The CHAIRMAN. Whenever they find that there is a violation of the statute it is their duty, is it not, under the statute, to proceed to the courts for remedies?

Mr. BACON. I do not understand that it is their duty to proceed through the courts. It is their duty to hear any complaint respecting such violations.

The CHAIRMAN. And when they hear that a violation of the statute has occurred, you say that you have not yet known that it was their duty to proceed to the courts?

Mr. BACON. No, sir. It is their duty to investigate.

The CHAIRMAN. To investigate?

Mr. BACON. And report.

The CHAIRMAN. Yes. And your understanding of the law—the present law—is that whenever they find that there is a violation, that ends the matter, except as they may advise the discontinuance of it?

Mr. BACON. The act states that on finding any violation of the law the Commission shall notify the carrier to that effect and notify it to discontinue that violation.

The CHAIRMAN. Yes.

Mr. BACON. Those are the words the statute uses.

The CHAIRMAN. And in your judgment that ends the duty and the power of the Commission.

Mr. BACON. The Commission is authorized——

The CHAIRMAN. Will you just answer that question, please?

Mr. BACON. What is the question? Just let me have it again.

The stenographer read the question as follows:

And in your judgment that ends the duty and the power of the Commission?

The CHAIRMAN. When they have ordered the Commission to desist?

Mr. BACON. No, sir; it does not.

The CHAIRMAN. That is, for the railroad companies to desist?

Mr. BACON. No, sir. It is authorized to proceed to enforce its orders through the courts.

The CHAIRMAN. Yes.

Mr. BACON. In case that is not obeyed by the railway company. But let me say right here——

The CHAIRMAN. Go on and answer that point.

Mr. BACON (continuing). The extent of the power conferred by the act upon the Commission in regard to a discriminative rate or an excessive rate is to so declare it, and to notify the company to cease and desist from that violation. The result of it is that its order may be complied with by a change of 1 per cent, we will say, on the existing rates, when under the existing circumstances, it is plain that there ought to be a change of 10 or 20 per cent.

The CHAIRMAN. Yes.

Mr. STEVENS. I wish you would file with the committee all the instances you know of that thing having been done. I think it will be of great use for us to investigate.

Mr. BACON. It will be a pretty difficult thing to do.

Mr. STEVENS. That thing has been done, I understand.

Mr. BACON. It has been done.

Mr. STEVENS. I would like to know the instances. I wish that you would file that information with the committee.

Mr. BACON. I will give you one instance right at this present moment.

Mr. STEVENS. If you have time, I wish that you would file full information on that with the committee.

Mr. BACON. I will give you one instance right now, of a case in which I had an important part myself, known as the Milwaukee case, which was brought against seven different railroads transporting grain from west of the Mississippi to Milwaukee on one hand and Minneapolis on the other. The rates to Milwaukee were believed to be unreasonable in proportion to the rates to Minneapolis. That case was brought before the Commission, and was decided favorably to the Milwaukee people, and a definite order was issued by the Commission requiring that the rates to Milwaukee should not exceed the rates to Minneapolis by a greater sum than the difference shown in the distances carried on the roads in question—the difference shown in the rates carried on the roads in question for corresponding distances.

I will say that the distances carried are applicable only to short distances, and are not applicable to terminal points; but the differences between those short distances—the local traffic, as it is called—were applied to the terminal rates, and the roads were required to change those terminal rates in conformity therewith. That would have involved a reduction from Milwaukee, from the points in question—two or three hundred of them, probably—of from 2 to 3 cents per hundred pounds, and would have equalized the two markets. That is, it would have placed the two markets upon a par for grain shipments west of the Mississippi River on their way to the seaboard. But the railway companies declined to make the change, and instead of making the change required, made a change of about one-half, in most cases less than one-half, of the difference required by the Commission. That, as you will readily see, afforded no relief, for the reason that it required the full change which the Commission found was necessary in order to put the markets on an equality. That is one case that I have given you. I could probably cite a great many others by looking over the records, but this shows the difference, clearly.

Thereupon the committee adjourned until Friday, December 16, 1904, at 10.30 o'clock a. m.

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NEW ORLEANS, *December 6, 1904.*

HON. JOHN SHARP WILLIAMS,  
*Washington, D. C.*

DEAR SIR: I wish to assure you of the appreciation of the members of the Central Yellow Pine Association for the interest you express in your recent letter to me, in legislation to amend the interstate commerce act to the extent that the Commission, upon complaint, will have the power to fix a reasonable rate after hearing.

A number of bills have been introduced into Congress, all seeking to amend the law in about the same way, some, however, to a greater extent than others.

In view of the fact that the railroad interests will oppose any kind of legislation enlarging the powers of the Interstate Commission it has been deemed best to try, at this time, to secure only such an amendment as is represented by the Cooper bill. If any larger powers are undertaken to be secured it is feared that through the opposition of the friends of the railroads legislation of any kind in the interest of the public will fail.

It has been suggested by some who are in favor of legislation that the Cooper bill is not adequate, and that the measure is imperfect and if enacted into law will afford very little if any relief, for the following reasons:

First. That the first clause of the bill does not sufficiently authorize the Commission or make it its duty to find what is a reasonable and lawful rate to be substituted in lieu of one found to be unreasonable and unlawful; and, second, the provisions of the bill which authorize the court to set aside the order of the Commission if it is found to be unjust or unreasonable on the facts is, in the opinion of some who have given the subject thought, fatal to the purposes of the bill.

I have asked Mr. Bacon, chairman of the executive committee of the Interstate Law Association, who is in Washington at the present time, in charge of the measure, to confer with you and to secure your assistance in getting a favorable report from the House committee.

If the Cooper bill as presented is not adequate to secure small measure of relief contemplated, I hope through your efforts it can be, in committee or after it is presented to the House, amended so that shippers when they are unjustly treated by the railroads can be assured of prompt relief upon complaint and after hearing.

Yours, very truly,

GEO. S. GARDINER,  
*President Central Yellow Pine Association.*

*List of cases decided prior to the Supreme Court decision in the Maximum Rate case May 24, 1897 167 U. S., 479, in which the Commission ordered changes to be made in rates found to be unjust or unreasonable.*

| Title of case.  | Date.          | Citation.             |
|---|----------------|-----------------------|
| Evans v. O. R. & N. R. Co.                                    | Dec. 3, 1887   | 1 I. C. C. Rep., 325. |
| Reed v. O. R. & N. R. Co.                                     | do             | 1 Ib., 325.           |
| Farrar v. E. T. V. & G. R. Co.                                | Feb. 15, 1888  | 1 Ib., 480.           |
| Pyles & Sons v. E. T. V. & G. R. Co.                          | do             | 1 Ib., 465.           |
| Hurlburt v. Penn. R. Co.                                      | July 20, 1888  | 2 Ib., 130.           |
| Hurlburt v. L. S. & M. S. R. Co.                              | do             | Do.                   |
| Parkhurst & Co. v. Penn. R. Co.                               | July 23, 1888  | 2 Ib., 131.           |
| Nicolai v. Penn. R. Co.                                       | do             | Do.                   |
| New Orleans Cotton Exchange v. C. N. O. & T. P. R. Co.        | Nov. 26, 1888  | 2 Ib., 375.           |
| James & Abbott v. E. T. V. & G. R. Co.                        | Sept. 25, 1889 | 3 Ib., 225.           |
| New Orleans Cotton Exchange v. Ill. C. R. Co.                 | Apr. 11, 1890  | 3 Ib., 534.           |
| Re Alleged Freight Rates on Food Products.                    | July 19, 1890  | 4 Ib., 116.           |
| Harvard Co. v. Penn. Co.                                      | Oct. 23, 1890  | 4 Ib., 212.           |
| Coxe Bros. & Co. v. L. V. R. Co.                              | Mar. 13, 1891  | 4 Ib., 535.           |
| Boston Fruit & Produce Exchange v. N. Y. & N. E. R. Co.       | Mar. 19, 1891  | 4 Ib., 664.           |
| Delaware State Grange v. N. Y. P. & N. Ry. Co.                | Apr. 13, 1891  | 4 Ib., 588.           |
| James & Mayer B. Co. v. C. N. O. & T. P. R. Co.               | June 29, 1891  | 4 Ib., 744.           |
| Florida Railroad Commission v. S. F. & W. R. Co.              | Oct. 28, 1891  | 5 Ib., 13.            |
| Lehmann, Higginson & Co. v. T. & P. R. Co.                    | Nov. 30, 1891  | 5 Ib., 44.            |
| Rising v. S. F. & W. R. Co.                                   | Jan. 28, 1892  | 5 Ib., 120.           |
| Perry v. F. C. & P. R. Co.                                    | do             | 5 Ib., 97.            |
| Murphy, Wasey & Co. v. Wabash R. Co.                          | Jan. 30, 1892  | 5 Ib., 122.           |
| Merchants' Union of Spokane v. No. Pac. R. Co.                | Nov. 28, 1892  | 5 Ib., 478.           |
| Independent Refiners Assn. v. W. N. Y. & P. R. Co. (3 cases). | Nov. 14, 1892  | 5 Ib., 415.           |
| Troy Bd. Trade v. Ala. M. R. Co.                              | Aug. 15, 1893  | 6 Ib., 1.             |
| Duncan v. A. T. & S. F. Ry. Co.                               | Nov. 3, 1893   | 6 Ib., 85.            |
| Duncan v. So. Pac. Co.  | do             | Do.                   |



## 28 PROPOSED AMENDMENT OF INTERSTATE-COMMERCE LAW.

*List of cases decided prior to the Supreme Court decision in the Maximum Rate case May 24, 1897, etc.—Continued.*

| Title of case.   | Date.         | Citation.             |
|--|---------------|-----------------------|
| Morrell v. Un. Pac. R. Co .....                            | Dec. 22, 1893 | 6 I. C. C. Rep., 121. |
| Newland v. No. Pac. R. Co .....                            | Jan. 31, 1894 | 6 Ib., 131.           |
| Page v. D., L. & W. R. Co .....                            | Mar. 23, 1894 | 6 Ib., 148.           |
| Cincinnati Freight Bureau v. C., N. O. & T. P. R. Co ..... | May 29, 1894  | 6 Ib., 196.           |
| Chicago Freight Bureau v. L. N. A. & C. R. Co .....        | do .....      | Do.                   |
| Charleston Truck Farmers' Assn. v. N. E. R. Co .....       | Apr. 6, 1895  | 6 Ib., 295.           |
| Hill & Bro. v. N. C. & St. L. R. Co .....                  | Oct. 19, 1895 | 6 Ib., 343.           |
| Cordele Machine Shop v. L. & N. R. Co .....                | do .....      | 6 Ib., 361.           |
| Colorado Fuel & Iron Co. v. So. Pac. Co .....              | Nov. 25, 1895 | 6 Ib., 488.           |
| Evans v. Union Pac. R. Co .....                            | Feb. 8, 1896  | 6 Ib., 520.           |
| May v. McNeil, receiver, O. R. & N. R. Co .....            | do .....      | Do.                   |
| Jerome Hill Cotton Co. v. M., K. & T. R. Co .....          | May 20, 1896  | 6 Ib., 601.           |
| Missouri R. R. Commission v. Eureka Springs R. Co .....    | Feb. 26, 1897 | 7 Ib., 69.            |
| Milk Producers' Prot. Assn. v. D., I. & W. Ry .....        | Mar. 13, 1897 | 7 Ib., 92.            |

*List of cases decided subsequent to the Maximum Rate decision of the Supreme Court, May 24, 1897 (167 U. S., 479), in which the Commission found rates complained of to be unjust or unreasonable and ordered them to be discontinued.*

| Title of case.  | Date.         | Citation.                          |
|---|---------------|------------------------------------|
| Suffern, Hunt & Co. v. I. D. & W. R. Co .....                   | July 1, 1897  | 7 I. C. C. Rep., 255<br>(2 cases). |
| Cary v. Eureka Sprgs. R. Co .....                               | Aug. 21, 1897 | 7 Ib., 286.                        |
| Callaway v. L. & N. R. Co .....                                 | Dec. 31, 1897 | 7 Ib., 431.                        |
| Milwaukee Chamber Commerce v. C., M. & St. P. R. Co .....       | Jan. 19, 1898 | 7 Ib., 481.                        |
| Cattle Raisers' Assn. v. Ft. W. & D. C. R. Co .....             | Jan. 20, 1898 | 7 Ib., 513.                        |
| Phillips, Bailey & Co. v. L. & N. ....                          | Oct. 29, 1898 | 7 Ib., 93.                         |
| Grain Shippers' Assn. of N. W. Iowa v. L. C. R. Co .....        | June 22, 1899 | 7 Ib., 158.                        |
| Savannah Bureau, etc., v. L. & N. R. Co .....                   | Jan. 8, 1900  | 8 Ib., 877.                        |
| Hampton Board of Trade v. N. C. & St. L. R. Co .....            | Mar. 10, 1900 | 8 Ib., 503.                        |
| Warren-Ehret Co. v. Cent. R. of N. J. ....                      | Dec. 22, 1900 | 8 Ib., 698.                        |
| McGrew v. Mo. Pac. R. Co .....                                  | Feb. 8, 1901  | 8 Ib., 630.                        |
| Hilton Lbr. Co. v. W. & W. R. Co .....                          | Apr. 10, 1901 | 9 Ib., 17.                         |
| Natl. Wholesale Lbr. Dirs. Assn. v. N. & W. R. Co .....         | Dec. 11, 1901 | 9 Ib., 87.                         |
| Wilm. Tariff Assn. v. C. P. & V. R. Co .....                    | Dec. 17, 1901 | 9 Ib., 118.                        |
| Johnson v. C., St. P., M. & O. R. Co .....                      | May 7, 1902   | 9 Ib., 221.                        |
| Re Proposed Advances in Freight Rates .....                     | Apr. 1, 1903  | 9 Ib., 382.                        |
| Mayor, etc., of Wichita v. A., T. & S. F. R. Co .....           | Oct. 24, 1903 | 9 Ib., 584.                        |
| Marten v. L. & N. R. Co .....                                   | Nov. 21, 1903 | 9 Ib., 681.                        |
| Georgia Peach Growers' Assn. v. Atlantic Coast Line R. Co ..... | June 4, 1904  | 10 Ib., 255.                       |
| Aberdeen Com. Group Assn. v. M. & O. R. Co .....                | June 25, 1904 | 10 Ib., 289.                       |
| N. O. Live Stock Exch. v. T. & P. R. Co .....                   | do .....      | 10 Ib., 327.                       |
| Re Transportation of Fruit on P. M. & Mich. Cent. R. Co .....   | July 27, 1904 | 10 Ib., 360.                       |

NOTE.—The foregoing cases of the Commission involved the unreasonableness and injustice of rates only.

Numerous other decisions of the Commission involved the reasonableness of rates considered collaterally with unjust discrimination, undue preference, and violations of the long and short haul section.

EDW. A. MOSELEY,  
*Secretary.*

FRIDAY, *January 6, 1905.*

The committee met at 10.40 o'clock a. m., Hon. William P. Hepburn in the chair.

The CHAIRMAN. We will resume the hearings upon the interstate commerce propositions. Mr. Bacon is here, and Mr. Mann, I understand, desires to ask him some questions.

**STATEMENT OF MR. E. P. BACON—Resumed.**

MR. MANN. How long have you been interested in the proposed amendment or proposed amendments to the interstate commerce law?

MR. BACON. I have taken an active part in the matter for five years past, and have felt interested in it ever since the decision of the Supreme Court which denied the power to the Commission to designate what change should be made in a rate found to be unjust or discriminative.

MR. MANN. And during that time have you given very special study to the subject?

MR. BACON. I have, so far as I could do so in connection with proper attention to my business.

MR. MANN. You are the chairman of the executive committee of the so-called Interstate Commerce Law Convention?

MR. BACON. Yes, sir.

MR. MANN. Do you consider yourself an expert on the subject of rate making?

MR. BACON. I would not make such a statement; no, sir. I have given a good deal of study to it and feel fairly well informed in regard to it, but I would not consider myself an expert, by any means.

MR. MANN. Do you consider yourself an expert upon the question of what legislation should be enacted to give the Interstate Commerce Commission power to make freight rates?

MR. BACON. I have definite ideas in relation to it.

MR. MANN. Well, if you would answer my question I think we would get to it easier.

MR. BACON. I should not say that I am an expert in legislation, for I am not.

MR. MANN. Do you consider yourself an expert on the question as to whether changes should be made, and if so, to what extent, in the power of the Interstate Commerce Commission?

MR. BACON. I must say that I do not consider myself an expert in any of these matters. I have given much attention to them and have reached definite conclusions in relation to them, which are mature, and on which I am very clear.

MR. MANN. Do you consider that the subject of rate making by railroads is a matter requiring expert or technical knowledge, or a subject which can be passed upon by the ordinary layman without expert knowledge?

MR. BACON. Railroad men have recently testified that the making of rates is not a science.

MR. MANN. If you will answer my question I will be very much obliged to you.

MR. BACON. Please repeat it.

Mr. MANN. I did not ask about railroad men, but I asked for your opinion.

Mr. BACON. I answered that question by giving the opinion of railroad traffic managers, which I fully coincide in.

Mr. MANN. You agree that it does not require—you state that it does not require an expert knowledge to make freight rates?

Mr. BACON. That is not exactly what I mean.

Mr. MANN. Won't you tell us just what you do mean on the subject.

Mr. BACON. The matter of making rates is largely a matter of experiment and of development. Rates are made by traffic managers with the view to testing their correctness and their practicability, and as changes are found to be necessary in the workings of the business they are made, one after another, until finally a rate is reached which is found to be practicable and as satisfactory as circumstances will permit.

Mr. MANN. If you will permit me to direct your attention to my question, it was as to whether it requires expert knowledge in order to make this, or whether freight rates can be made at random without expert knowledge, in your judgment.

Mr. BACON. They certainly can not be made at random, but I consider that a proper study of the subject on the part of one who gives his attention to it, and particularly one who is charged with the duty of regulation of railroad rates, will give him sufficient knowledge on the subject to determine whether the rates already existing are correct, are just, are reasonable, or not; and, if not, what should be substituted in their place that will be so. I do not consider that it is necessary that a man should have had experience in the traffic department of a railroad in order to form a judgment in regard to the determination of a question of that kind.

Mr. MANN. Of course, I did not ask you that question, although the information is very valuable. What I wanted to know was whether it required, in your judgment, expert knowledge to make freight rates.

Mr. BACON. If you mean, by expert knowledge, the knowledge of the man who has given his life to the making of rates, I should answer the question in the negative.

Mr. MANN. You think it does not require any very extended knowledge to determine?

Mr. BACON. You asked me if it required expert knowledge.

Mr. MANN. I did.

Mr. BACON. And I replied to that.

Mr. MANN. That it does not require expert knowledge to make freight rates?

Mr. BACON. That it does not require the expert knowledge acquired by actual service as the traffic manager of a railroad.

Mr. MANN. You hedge your answer so that it is valueless. In your judgment, does it require expert knowledge to determine upon the making of freight rates or not?

Mr. BACON. I think I have answered that, Mr. Mann.

Mr. MANN. I do not think you have.

Mr. BACON. I would like to hear my answer repeated, if the stenographer will give it to me.

The stenographer read as follows:

Mr. MANN. Of course I did not ask you that question, although the information is very valuable. What I wanted to know was whether it required, in your judgment, expert knowledge to make freight rates.

Mr. BACON. If you mean by expert knowledge the knowledge of the man who has given his life to the making of rates, I should answer the question in the negative.

Mr. MANN. You think it does not require any very extended knowledge to determine.

Mr. BACON. You asked me if it required expert knowledge.

Mr. MANN. I did.

Mr. BACON. And I replied to that.

Mr. MANN. That it does not require expert knowledge to make freight rates?

Mr. BACON. That it does not require the expert knowledge acquired by actual service as the traffic manager of a railroad.

Mr. MANN. Of course it is immaterial how the expert knowledge is acquired.

Mr. BACON. I will answer further, that it does require knowledge from investigation of the subject and examination into the circumstances and conditions relating to the particular rate in question.

Mr. MANN. Now, to change the subject. You testified before our committee that the Elkins bill was prepared by the general solicitor of the Pennsylvania Railroad, and that the Cooper-Quarles bill was substantially the Elkins bill.

Mr. BACON. As the Elkins law was amended by agreement between the general counsel of the Pennsylvania Railroad and representatives of the executive committee of the Interstate Commerce Law Convention.

Mr. MANN. You testified, as I remember, to this effect that "the bill now before you, No. 6273, comprises the provisions of the Elkins bill, revised as above stated, with the exception of the pooling and traffic association provision, which has been omitted. All the provisions contained in the present bill were contained in each of the several bills heretofore mentioned," including the Elkins bill. I understand that to be your statement?

Mr. BACON. Yes, as I understand it. I will state, however, that there is one omission in the Cooper bill from the original Elkins bill, which is this: The Elkins bill provides that a rate fixed by order of the Commission should only be in force one year. That has been omitted, and there has been submitted in its place authority for the Commission to modify or change a rate that it has previously made, upon full hearing of both parties, at any time.

Mr. MANN. And that was the only substantial change made?

Mr. BACON. That was the only change of any importance.

Mr. MANN. In other words, as you said in the testimony before this committee, the Cooper-Quarles bill is simply a redraft of the revised Elkins bill, eliminating the pooling section?

Mr. BACON. Substantially so; yes.

Mr. MANN. The Elkins bill, according to your statement, was prepared directly and drawn personally by the general counsel of the Pennsylvania Railroad Company.

Mr. BACON. It was so stated at the time, and I believe that to have been the case.

Mr. MANN. Well, do you not know whether it is the case? You were in consultation with Mr. Logan, were you not?

Mr. BACON. Yes, sir.

Mr. MANN. And you knew whether he drew the bill or not?

Mr. BACON. It was the general understanding that he drew it, and in my negotiations with him it was so treated.

Mr. MANN. Did you have any statement from him as to whether he drew it?

Mr. BACON. I think that he stated to me that he drew the bill.

Mr. MANN. Who is the vice-chairman of your law convention?

Mr. BACON. The vice-chairman is Mr. Charles H. Seybt, of St. Louis.

Mr. MANN. He is a director in the Vandalia Railroad, is he not?

Mr. BACON. I understand he is; yes, sir.

Mr. MANN. That is a part of the Pennsylvania Railroad system, is it not?

Mr. BACON. It is a part of its system; whether it is owned or leased I do not know. I think it is leased.

Mr. MANN. It is a part of the Pennsylvania system, and the Pennsylvania Railroad determines who the directors shall be?

Mr. BACON. That I am not certain about; but it is understood to be under the control of the Pennsylvania Railroad Company.

Mr. MANN. The secretary of your convention is Mr. Frank Barry?

Mr. BACON. Yes, sir.

Mr. MANN. He is also the manager of the organization in Washington?

Mr. BACON. We do not style him manager; he represents the committee in Washington.

Mr. MANN. Did you not elect him as manager of the organization in Washington?

Mr. BACON. No, sir; he was the secretary, elected as secretary, with the understanding, however, that he would spend his time in Washington during the sessions of Congress.

Mr. MANN. The reports of your proceedings show that you elected him as manager of the organization.

Mr. BACON. Will you please cite it?

Mr. MANN. I will, although I do not know whether I can pick it right out at this moment or not. I will call your attention to it.

Mr. BACON. He was elected by the executive committee at a meeting held after the adjournment of the convention, and he was elected as secretary.

Mr. MANN. Elected as secretary by the committee?

Mr. BACON. By the committee; yes, sir.

Mr. MANN. I will call your attention to that report later, so that you may know what the title is that you conferred upon Mr. Barry.

Mr. BACON. Whatever he may be styled it is expected that he will be in Washington during the sessions of Congress for the purpose of giving any information that may be desired in relation to proposed legislation.

Mr. MANN. He occupied the same position a year ago?

Mr. BACON. Yes, sir.

Mr. MANN. And was here in Washington in charge of the movement inaugurated by the Interstate Commerce Law Convention, which you are also representing?

Mr. BACON. He was; yes, sir.

Mr. MANN. Did you ever see the article which he wrote, or purported to write, published in "Freight," of April, 1904?

Mr. BACON. I do not now recall it.

Mr. MANN. I will call your attention to a statement in that publication [reading]:

Progress is being made slowly toward the enactment of the Cooper and Quarles bills to amend the act to regulate commerce, but it is satisfactory withal. \* \* \* Thus far, however, a majority of that committee has refused to accord us so much as a hearing, and its chairman and several of the influential members assert that they will not consent to spend any time upon the subject, being wearied with the importunities of the public during the past few sessions of Congress for such legislation. This committee is so constituted that its majority stands as a "stone wall" to prevent any enactments which may be disapproved by the railroads of the country.

Did you ever see that article?

Mr. BACON. It seems to me that I have seen it. I have not a very distinct recollection about it. But, however that may be, I will say that that is a purely personal act on his part, not authorized by the committee or coming under its cognizance in any way.

Mr. MANN. Do you employ a secretary who as secretary writes articles for the public press which you do not approve of?

Mr. BACON. I hardly think it is competent for the committee to pass its own opinion upon the act of the secretary outside of the duties of his office.

Mr. MANN. Do you approve of an article of this sort?

Mr. BACON. I hardly want to express an opinion in relation to that. I do not think that has any bearing upon the merits of this legislation.

Mr. MANN. If it has no bearing upon the merits of this legislation, then why do you permit your secretary to publish such a thing and why do you also publish such things?

Mr. BACON. We can hardly be expected to control every movement and every utterance of our secretary. In regard to your allusion to myself I will say that I have never published anything of that kind.

Mr. MANN. We will come to that later.

You did not want any hearings on this Cooper-Quarles bill?

Mr. BACON. We felt that the hearings held two years ago last April were ample, and we desired to expedite legislation by waiving the offering of any further testimony. We felt, however, that the railways would desire hearings, and for that reason we urged the setting of a time for hearings during the last session of Congress. Having failed in that, we have entirely withdrawn from the offering of further testimony for the purpose of expediting the legislation.

Mr. MANN. You published a pamphlet purporting to contain an address delivered by you to this committee, in which you stated that you did not wish further hearings, as I remember, at the last session of Congress?

Mr. BACON. At the last session of Congress we were seeking to have hearings fixed; but at the latter end of the session—in the last two weeks of the session—we requested or at least stated that we desired no hearings, and if the opposition desired them we wished to have them as speedily as possible, but that in fact we saw no occasion for further hearings on account of the previous one having been so exhaustive.

Mr. MANN. The publication "Freight" you are acquainted with?

Mr. BACON. I have seen it; yes, sir.

Mr. MANN. You are an admirer of it, are you not?

Mr. BACON. I think it is a useful publication in its way.

Mr. MANN. You have warmly commended it over your signature?

Mr. BACON. Yes, I have.

Mr. BACON. You spoke at first as though you had hardly heard of it, and I did not know. In the publication "Freight" you wrote an article in which you stated that—

"Owing to the opposition of the leading members of the Interstate Commerce Committees of the two Houses to any legislation further restricting the power of the carriers to make and enforce such rates as they may see fit, it has been impossible," etc.

Do you believe that statement is true?

Mr. BACON. I think it was true at the time it was written. Don't you think it was true?

Mr. MANN. I know it was not true. I know that it was a libel and a slander. I know it was false, and I believe you know it was false.

Mr. BACON. Well, Mr. Mann, I wish to say that I am not here to be characterized as a falsifier, and I will say, further—

Mr. MANN. Well, if you write articles you must take the consequences.

Mr. BACON (continuing). That where I am known that has been the last thing that has ever been attributed to me. What I said then I said conscientiously.

Mr. RICHARDSON. I would be glad to know what statement you did make on the subject.

Mr. BACON. Mr. Mann just read a statement from a communication which I gave, I believe, to the publisher of "Freight." Is that what it is?

Mr. MANN. That is what it is from; yes.

Mr. BACON. I made the statement conscientiously, and I believed it to be true, and now believe that it was true at the time.

Mr. RICHARDSON. Have you examined the records of the Interstate Commerce Committee and the votes of last session?

Mr. MANN. If you have not seen the records I have the records here, Mr. Richardson.

It is also stated by "Freight" that in your address before the St. Louis Convention that you stated "that over three-fourths of the representatives in Congress owed their presence there to the influence of the railroads." Did you make such a statement?

Mr. BACON. I saw that statement immediately after the convention, and I had no recollection of uttering it. My remarks were entirely extemporaneous at the time, and I could not recall anything of that character.

Mr. MANN. You saw that statement in the November issue of "Freight," and in the December issue of "Freight" you wrote a letter telling "Freight" what a valuable publication it was, but did not consider it necessary to refute that statement?

Mr. BACON. I have not been able to command time to say what I should want to in relation to everything I have seen published in connection with this legislation, and hence did not make any attempt to make any refutation. I did not suppose it was of sufficient importance to require it.

Mr. MANN. I suppose you thought anybody in the country could go out and libel a member of Congress and have no attention paid to

it. It is fortunately true that people in the country generally do not pay much attention to such statements.

Mr. BACON. As I said before, I have no recollection of saying that and had not at the time, although I saw it within two or three days after the convention.

Mr. MANN. I sincerely hope, Mr. Bacon, that a gentleman of your standing—and I do appreciate the high standing you have—would know better than to make a statement like that, which you ought to know is false.

Mr. BACON. I did inquire of two or three persons at the convention if they heard me make such a statement, and they did not recall it.

Mr. MANN. You said, however, in your address in St. Louis that “four of the members of this committee have declared that they will permit no action on the part of the committee upon any bill which is before them until definite action is taken upon this particular bill,” relating to the Cooper-Quarles bill?

Mr. BACON. I think I did make that statement, which I did from statements made to me by the gentlemen.

Mr. MANN. I do not ask who the four members are. You were here this morning when we reported a number of bills without opposition?

Mr. BACON. I hardly think it would be proper for me to give the names. It was stated to me in private conversation.

Mr. MANN. I am not asking for it. You probably believed that statement?

Mr. BACON. Yes.

Mr. MANN. You made it?

Mr. BACON. Yes.

Mr. SHACKLEFORD. Did you make that from talking with members themselves?

Mr. BACON. I think I made it in an address.

Mr. SHACKLEFORD. But did you derive your information from talking with these four members?

Mr. BACON. Yes, sir.

Mr. SHACKLEFORD. I desire to ask you if Mr. Shackelford, of Missouri, was one of them?

Mr. BACON. No, sir; he was not.

Mr. TOWNSEND. When was that address delivered?

Mr. MANN. In October, last fall, just before the election. Now, the fact is that the Cooper-Quarles bill was the bill drawn by the attorney of the Pennsylvania Railroad Company in all of its features, is it not?

Mr. BACON. It is, as I have said before, a redraft of the bill which the late Judge Logan, general counsel of the Pennsylvania Railroad, originally drew, with some changes and modifications.

Mr. MANN. Of not any importance, however, you say?

Mr. BACON. The most important one was the one which I mentioned.

Mr. MANN. The others are not of any importance?

Mr. BACON. The others are principally verbal changes, with the view of making it clearer and more specific and less liable to misconstruction.

Mr. MANN. And yet, because the members of this committee were



not willing to report that bill without a hearing, a bill drawn by the attorney of the principal railroad company of the land, you and your secretary denounced this committee as railroad representatives.

Mr. BACON. I never have characterized the members of this committee, nor the members of Congress, as railway representatives.

Mr. MANN. I have just read to you what you stated. Both you and your secretary characterized members of Congress as railway representatives, under the influence of the railways, and opposed to making any change whatsoever in the power of the railroads to fix rates, because we would not report without hearing a bill drawn by the general counsel of the Pennsylvania Railroad Company. Do you think that that was fair to the members of the committee?

Mr. BACON. That bill had been before this committee, in the bill that was introduced by Mr. Wanger of the committee, after having been before the Senate for some two or three months, I think, and both the Senate committee and House committee had been holding hearings for two months upon that, together with the other bills. The principles contained in that bill were substantially the same as those contained in the Corliss bill, which was the House bill upon the same subject; but our committee upon negotiation with the Pennsylvania Railroad Company officers accepted the Elkins bill as a substitute for the Corliss bill, the Corliss bill having embraced several provisions that were not embraced in the Elkins bill. We waived those other provisions and accepted the Elkins bill in its place, the provisions of the Elkins bill, I say having been already included in the Corliss bill, which had been the subject of investigation.

Mr. MANN. In other words, you went over to the railroad bill, and because the committee would not follow you fast enough you say that we are under the influence of the railways?

Mr. BACON. I have not said any such thing, Mr. Mann.

Mr. MANN. I am very glad if you will say you did not say that. When I read it to you a while ago you would not say that you did not say it.

Mr. BACON. The question has often been put, is not Mr. So-and-so under the control of the railroads, and I have denied it. I have said that they are actuated by their own views and sentiments in regard to legislation, and that I believe they are doing it honestly. I have said that repeatedly.

Mr. MANN. I am very glad to know that. Personally I have always considered you a gentleman of high standing and honor, but I must say that when I saw that you and Mr. Barry had flopped over to a railroad bill and then proceeded to denounce the Members of Congress because they did not chase you up on the bill that I had some doubts about the honesty of one of you.

Mr. BACON. You would be surprised, and probably some of the other members of the committee would be surprised, if you knew to what extent I have kept back certain elements, certain interests, in regard to this legislation, which I have done with as much energy as I have used in bringing forward those that sought reasonable and proper and suitable legislation.

Mr. MANN. Did you not during that summer after the revised Elkins bill was agreed to endeavor to have that become the law?

Mr. BACON. I did; yes, sir.

Mr. MANN. I was invited to attend a dinner at the Union League

Club by the Chicago Board of Trade members of this association, who insisted that I should support the revised Elkins bill. I laughed at them when they read to me the pooling clause in that bill and told them that it had as much chance as a snowflake in Hades. But you were in favor of it?

Mr. BACON. You understand—or I should explain—that in the arrangement with the Pennsylvania Railroad officials it was distinctly understood that our organization would stand entirely neutral in relation to the pooling provision; that we would not oppose it, and they could not expect us to advocate it, because our convention had taken no action upon that particular subject.

Mr. MANN. And yet Mr. Chadwick and Mr. Lyons, now the treasurer of your association, at this Union League Club dinner informed me that at your request they were urging me to support that bill in the committee, with the pooling clause in it. Would you deny that you made such a request to them?

Mr. BACON. I say we supported the bill, but with the distinct understanding that we were not favorable to that section.

Mr. MANN. Do you think this committee would have been wise to have reported that bill favorably to the House simply because you favored that bill—to have reported it to the House without hearing?

Mr. BACON. I do not think the committee would be wise to report any bill because I advocate it or recommend it or because any other individual did so. I suppose the committee has to determine for itself upon the wisdom of any bill which it has to report.

Mr. MANN. Now, that is preliminary, of course, as to what the committee should do. I want to direct your attention to the proposition as to whether this committee should be denounced by the officers of your association, because, without hearings, they did not report a bill which originally was drafted by the general counsel of a railroad company.

Mr. BACON. It has not been the intention of the association or of any of its officers to denounce this committee or any committee of Congress.

Mr. MANN. Well, your intentions and your acts are widely asunder.

Mr. BACON. We have simply stated what we understood to be the facts of the case.

Mr. MANN. Now the truth is Mr. Bacon, I think you will admit that while your secretary was denouncing this committee for non-action, we did report a bill at your request last winter, now called the Elkins law.

Mr. BACON. I do not understand the House committee reported that bill.

Mr. MANN. Well, then, you are mistaken, because the House committee did report the bill. I reported it in the House by direction of the chairman. The Elkins law——

Mr. BACON. You are speaking now of the final Elkins law that was reported and passed?

Mr. MANN. The Elkins law that was passed?

Mr. BACON. That was simply one section of the original Elkins bill, but not very materially changed.

Mr. MANN. Was that a section that you wished enacted in the law?

Mr. BACON. We wished that as much as we did any other section.

Mr. MANN. And we did report that bill?

Mr. BACON. Yes.

Mr. MANN. Was that showing that we did not wish to consider any proposition of this sort?

Mr. BACON. We have given the committee great credit for the prompt reporting of that bill and its action in relation to it, as well as that of the House, has been highly appreciated.

Mr. MANN. I would be very glad if some time at your leisure you would call the attention of this committee to any place where you have ever given the committee credit for anything, except being under railroad influence.

Mr. BACON. I have done it hundreds of times, Mr. Mann.

Mr. MANN. I have read everything that I have ever received from you, clear through from beginning to end, and I have never found a line or suggestion of that sort.

Mr. BACON. I am very glad to know you have done so——

Mr. MANN. I have, and I have been profoundly instructed very often, too.

Mr. BACON. But I have written and said a great deal which has never come to the knowledge, probably, of any of the members of the committee.

Mr. MANN. I do not really see how it is possible, because we get so much from you. Now, if you will permit me to draw your attention a moment to the real subject. In a statement before this committee two years ago Mr. Knapp, the chairman of the Interstate Commerce Commission, used this language:

Under the present law the carriers exercise without restraint the initiative in rate making. They are free to put in just such tariffs as they see fit. They are under no legal restraint whatever in that regard, and there is no proposition to change the law in that respect. I do not advocate, and so far as I am aware no member of the Commission has ever advocated, that the initiative in rate making should be taken away from the carriers and given to the Commission or any other tribunal.

And then——

Now, all that is proposed is that in such a case as I have named, in order to give the Commission jurisdiction at all there must be a formal complaint served on the carriers, opportunity for them to answer, and a full hearing conducted, with all the formality of a judicial inquiry. Then, if the Commission in such case and upon the facts thus disclosed, reaches the conclusion that the rate in question is wrong, it shall have authority to name the rate which it thinks would be right to be put in place of the one in controversy.

I think you have also in a number of cases stated that what your committee wanted was power where a rate was found to be unreasonable that the Commission should have authority to determine what the rate should be to take its place. Now, I wish you would tell us just what your object is.

Mr. BACON. That is the precise thing that we want, but in the fixing of any rate there are other rates so closely related to it that it is absolutely essential that they should be considered in connection with it; and for that very reason the Elkins bill which read originally "a rate" was changed and the words "rate or rates" were substituted, following out the arrangement with Judge Logan, to whom I referred; and so the bill reads as it now stands "rate or rates."

Mr. MANN. "Freight"—your great publication, "Freight"—

Mr. BACON. Don't call that our publication, please.

Mr. MANN. I do, because "Freight" is the power behind the whole movement at present.

Mr. BACON. We have no interest or relation whatever to that publication.

Mr. MANN. Your committee has decided that "Freight" ought to be sent and referred to every person interested in the subject.

Mr. BACON. Our committee has been asked to indorse it and it has declined to do so.

Mr. MANN. You have indorsed it?

Mr. BACON. Not as a committee. I have recommended it.

Mr. MANN. I will show you that later.

Mr. BACON. I have recommended it being taken and read by every receiver and shipper in the United States, and I hope that will be the case, because it contains a great deal of valuable information for that class of people.

Mr. MANN. I want to call your attention to what you have asked for in print. In "Freight" the editor says:

We do not advocate conferring on the Commission the original rate-making power, but merely the power when a rate is complained of as being unfairly high or unjust, to decide what rate is fair.

That is what "Freight" says. Your secretary, Mr. Barry, the manager of your association—

Mr. BACON (interrupting). Excuse me, but does not the bill speak for itself in respect to that?

Mr. MANN. Well, we are considering the subject-matter.

Mr. BACON. We might save a little time by referring to citations.

Mr. MANN. I have one or two others here I would like to call your attention to;—also the President's message on the same subject—which are not handy but which I will call your attention to later.

In a circular of information which you have sent out recently, as I recollect it, you have stated that you do not wish the power conferred of rate making, but that when a rate on freight is found unreasonable that the Commission shall have authority to fix the rate. Did you not recently prepare a synopsis of the Quarles-Cooper bill and send it out through the country?

Mr. BACON. A year ago, or thereabouts, I did; yes, sir.

Mr. MANN. And in that synopsis did you not omit any reference to rates, and simply say rate?

Mr. BACON. I do not recollect; but if so it was wholly unintentional. I can not now see the distinction between the fixing of a rate and the fixing of rates, because the two must go together. It is a very rare case in which a single rate is questioned.

Mr. MANN. You do not see any distinction between conferring the power to fix a rate and the power to fix rates?

Mr. BACON. Most cases which come up embrace more than one rate. They necessarily embrace more than one rate in the case of discrimination in tariff rates, which is the great cause of complaints on the part of commercial men. It is the two rates from a given point to two different points—competing points—which constitute nine-tenths of the cases that have come before the Interstate Commerce Commission, and if the word "a" has been used it has been used simply in its generic meaning.

Mr. MANN. Well, I get a great many requests from people in my city, sent at the solicitation of your association, in which they ex-

pressly say to me that they think the Interstate Commerce Commission ought to have the power to fix a rate, but they do not wish to confer upon the Interstate Commerce Commission the power to fix railroad rates generally.

Mr. BACON. That is precisely the position of our committee. The fixing of rates generally has never been advocated by the committee, and I do not know that it has been advocated by any body of business men.

Mr. MANN. The power to fix rates is disclaimed generally by your committee?

Mr. BACON. Yes; emphatically.

Mr. MANN. And the power to fix rates is disclaimed generally by the Interstate Commerce Commission?

Mr. BACON. It is; emphatically.

Mr. MANN. You are acquainted, of course, with the case that went to the Supreme Court in which they stated that the Interstate Commerce Commission did not have the power to fix freight rates?

Mr. BACON. Yes.

Mr. MANN. You have read that decision frequently, I suppose?

Mr. BACON. Yes.

Mr. MANN. How many rates did that one decision determine?

Mr. BACON. I could not say definitely. I have the impression that it was somewhere between 200 and 300 rates, but Chairman Hepburn stated that—

Mr. MANN (interrupting). Do you know that that decision fixed the freight rates on every class of commodity, on every article in the southern classification, between Chicago and Cincinnati, and every point in the South, east of the Mississippi River and south of the Potomac and Ohio rivers, that that one opinion and decision did that?

Mr. BACON. I knew it fixed the rates to a large number of points in the southeastern territory. Whether it fixed the rate to all points or not I do not know.

Mr. MANN. Did you know it fixed the rate to every place in the South, south of the Potomac and Ohio rivers?

Mr. BACON. No.

Mr. MANN. And upon every article of freight?

Mr. BACON. It may have been so, and if you so state I shall not question it.

Mr. MANN. Well, the decision of the Supreme Court determines that question. That was under the authority which you are now seeking to put upon the Commission, where in one order they fix the rates to one quarter of the country, as the Supreme Court said, without much hearing.

Mr. BACON. Without what?

Mr. MANN. Without much hearing.

Mr. BACON. The case was a long time before the Commission, I recollect.

Mr. MANN. The Supreme Court said in that case—I never had the pleasure of reading the testimony of the Commission—that there was practically little evidence taken upon the subject of the rates—what should be the rates; and yet in that case the Commission, under the power, which you say you want, to fix a rate, and not rates generally, undertook to fix the rates to every point in the South upon every

article in a classification. Now, do you think they ought to have that power?

Mr. BACON. I will say in reply to that, Mr. Mann, that that embraced the system of rates in effect from Cincinnati and Chicago to points in the southeastern territory, upon merchandise and manufactures, which, on investigation, had been found to be very much higher for a less distance than rates on the same commodities—

Mr. MANN. Oh, well, you are seeking to argue the question as to what rates should go into effect—

Mr. BACON. I am not arguing; I am stating the facts. [Continuing] very much higher than the rates from the Atlantic seaboard to the same points, and in the course of the investigation it developed that those rates had been agreed upon by the several lines interested as a matter of regulating the east and the west bound business with the view of securing through merchandise and manufactures from the East and the agricultural products, necessarily, from the West, in order to afford traffic both ways and give them loaded cars both ways, and they were fixed—

Mr. MANN. So that—are you through?

Mr. BACON (continuing). They were fixed by means of a commission appointed by the several railroads in interest, and from the statements they made it is clear that that was the sole object they had in view in fixing the rates as they did, so very much higher from the western points to the points through the Southeast than from eastern points: and that being the case, the Commission found, when it went into the investigation, that they were unreasonably high compared to rates from the seaboard, and consequently they could do no less than to order them all changed. If, in an investigation of certain rates, there are 200 or 300 or 2,000 or 3,000 found to be wrong, why should not every one of those rates be changed as much as one of them?

Mr. MANN. So that, as a matter of fact, you are in favor of giving to the Interstate Commerce Commission the power to determine the rates upon every article between every point in one complaint?

Mr. BACON. When found upon investigation to be wrong and when related to each other in such a way that they can not be separated.

Mr. MANN. That might cover the whole United States in one complaint.

Mr. BACON. Hardly that.

Mr. MANN. Let us see whether "hardly that" or not. The ground of complaint in the case we refer to, the maximum rate case, was that rates from Western points to the South were too high as compared with rates from Eastern points to the South, as you have said.

Mr. BACON. That was it.

Mr. MANN. Now, when the Interstate Commerce Commission passed on rates from Western points to the South that necessarily affected rates from the Eastern points to the South, did it not?

Mr. BACON. That affected them by making them relatively equal.

Mr. MANN. Oh, it affected them by compelling the railroad companies to change them?

Mr. BACON. To be sure.

Mr. MANN. Which would also require the Interstate Commerce Commission to pass upon whether they were proper rates or not?

Mr. BACON. That is what I mean—

Mr. MANN. That would affect also the rates from New York to Chicago, necessarily?

Mr. BACON. It would have no relation to rates from New York to Chicago.

Mr. MANN. I am afraid you have not studied the rates fully enough, although I will admit, as you say, that you are not an expert.

Mr. BACON. I beg your pardon; rates from New York to Chicago have no relation to rates to the Southwest.

Mr. MANN. I beg your pardon; I say they have a very strong relation. What is the rate on first-class freight from New York to Chicago?

Mr. BACON. I could not say at the moment.

Mr. MANN. I will inform you. Seventy-five cents a hundred pounds.

Mr. BACON. That was my impression, but I was not clear upon it.

Mr. MANN. The rate to every other point between New York and Chicago is based on that.

Mr. BACON. Yes; not only that but the points between the Missouri River and New York.

Mr. MANN. Well, you are mistaken about that, Mr. Bacon.

Mr. BACON. Well, perhaps I am.

Mr. MANN. Rates from New York to Chicago are the basis upon which they make the rates from all other points between New York and a line drawn from Chicago to St. Louis, or the Mississippi River.

Mr. BACON. Yes, sir.

Mr. MANN. That is the case. Now, if the Interstate Commerce Commission endeavors to pass upon a rate from New York to Chicago it must also at the same time pass upon the rate to every other point within that territory, must it not?

Mr. BACON. That of itself would come about; that would be a natural result of it.

The CHAIRMAN. Excuse me. If there is no objection, we will continue at half-past 10 to-morrow morning.

Mr. SHACKLEFORD. I would like to ask one question. You said that this Quarles-Cooper bill was drafted by counsel for the Pennsylvania Railroad after conference with your committee?

Mr. BACON. Not the Quarles-Cooper bill; the original Elkins bill, of which this is a redraft.

Mr. SHACKLEFORD. This is really a redraft, substantially so?

Mr. BACON. Yes, sir.

Mr. SHACKLEFORD. Did the Interstate Commerce Commission enter into the conference in reference to that?

Mr. BACON. No, sir.

Mr. SHACKLEFORD. Were they consulted about it?

Mr. BACON. It is possible they were consulted after it was done, or at least that they were advised of what was done. I think they were, but they had no part in the conference.

Mr. SHACKLEFORD. They had no part in the manufacture of that bill?

Mr. BACON. No, sir; none at all.

Mr. SHACKLEFORD. Were they consulted as to whether it was satisfactory before it was introduced?

Mr. BACON. I think not before it was introduced. That, however,

I am not certain about. Excuse me—I recall now the bill was previously introduced before this conference between representatives of the Pennsylvania Railroad Company and the commercial organizations. Consequently any reference of it to the Commission was subsequent to its introduction.

The CHAIRMAN. There is one matter I would like to have you explain, if you will. You used the language, "the arrangement that was made with the officials of the Pennsylvania Railroad Company." What did you mean by that?

Mr. BACON. The individuals?

The CHAIRMAN. "The arrangement that was made?"

Mr. BACON. It was an understanding that was reached at the conference which I have mentioned, a conference for the purpose—

The CHAIRMAN. That you would mutually support that bill?

Mr. BACON. Mutually support the bill, with the distinct understanding that we would not support the pooling section, and that we would not oppose it.

Mr. SHACKLEFORD. That is, you would not oppose it?

Mr. BACON. Well, we were neutral.

The CHAIRMAN. You could not be neutral when you were advocating the passage of a bill that contained that clause. You were advocating the passage of the bill?

Mr. BACON. Yes; as a whole.

The CHAIRMAN. And then you were advocating the pooling clause in that bill as well as the other clauses?

Mr. BACON. Whenever the question was put to us as to that clause we said we were neutral.

The CHAIRMAN. But you wanted it passed?

Mr. BACON. We did not care whether that section was passed or not.

The CHAIRMAN. But it was in there, and to pass the bill it was necessary to pass it.

Mr. BACON. We were willing that it should be passed as a whole.

The CHAIRMAN. You were anxious that the bill should be passed as a whole, were you not?

Mr. BACON. I would not say that. We were anxious that the bill should be passed.

The CHAIRMAN. You were anxious that the bill should be passed, and this was a part of the bill?

Mr. BACON. To be sure.

The CHAIRMAN. This was a part of it, and under that situation you were just as anxious to have the pooling clause as any other, as a whole?

Mr. BACON. I could not say that, Mr. Chairman. I think I should say to the contrary, in fact; that the commercial organizations almost unanimously dissent from the proposition of pooling, and consequently our committee—

The CHAIRMAN. But you, as their agent, were here advocating the passage of a bill that contains the pooling clause.

Mr. BACON. The committee submitted it to the constituent organizations and obtained their assent to the bill.

The CHAIRMAN. You speak of the arrangement made—

Mr. BACON. Perhaps I should have said more properly, "the understanding."



The CHAIRMAN (continuing). That means something active, does it not?

Mr. BACON. Perhaps I should have used the word "understanding," the understanding that was had between us.

Mr. ADAMSON. Do you say that the authorities of the Pennsylvania Railroad agreed to support the provision for rate making?

Mr. BACON. The first section of the bill.

Mr. ADAMSON. And you say they agreed to it?

Mr. BACON. Not only agreed to it, but they proposed it; they originated it. That is the first section of the bill, and is also the first section of the Cooper bill.

Thereupon at 11.55 the committee adjourned until Monday, January 9, 1905, at 10.30 o'clock a. m.

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MONDAY, January 9, 1905.

The committee met at 10.50 o'clock a. m., Hon. William P. Hepburn in the chair.

Mr. LOVERING. Mr. Chairman, I want to object to the methods and manner of carrying on this examination. There is entirely too much personality in it. I am here as one of the committee, to get at facts, and it is a matter of very little consequence to me whether I am one of four men who have been accused of holding up the bill. I do not think that it amounts to anything for us to know it, or to go into that part of it. As to any questions that will elicit facts, I shall be very glad to join with the committee in eliciting such information, but beyond that I want it to be understood that I absolutely disclaim any part or parcel in the manner of questioning that we underwent—that was followed out at the last session. That is all I have to say.

Mr. RICHARDSON. I did not hear distinctly all of your remarks, Mr. Lovering. You were too far from me for me to hear distinctly. I caught the drift of it, I believe, that you thought that there was altogether too much personality and too little reference to the bill in these examinations.

Mr. LOVERING. That was the gist of it.

Mr. RICHARDSON. I am disposed to agree with you.

Mr. BACON. I would like to say that a gentleman is here this morning from Boston, Mr. George F. Mead, who is an officer of one of the important commercial organizations, who has got to go away at 11 o'clock this morning, and if the committee will be pleased to hear him for a few minutes I will give way to him.

Mr. MANN. I think that he ought to be heard. We have heard Mr. Mead before, and we would be very glad to hear him again, so far as I am concerned.

Mr. RICHARDSON. Just one suggestion, if you please, along that line. I would like to know, as a member of the committee, whether to-day is going to be the only time that we will have for the further examination of Mr. Bacon. I am very anxious to ask Mr. Bacon some questions myself, and an intimation was given at the last adjournment of the committee that Mr. Bacon would be here only to-day.

Mr. BACON. That is a mistake, Mr. Richardson. I intend to remain here a week or ten days yet.

Mr. RICHARDSON. Very well; then that is all right.

The CHAIRMAN. If there is no objection the committee will hear briefly from Mr. Mead.

**STATEMENT OF MR. GEORGE F. MEAD, OF BOSTON, MASS.**

Mr. MEAD. I thank you for your courtesy. I represent the National League of Commission Merchants, and also the Boston Fruit and Produce Exchange, a body which, at their annual meeting on Saturday last, passed resolutions in favor of the Cooper-Quarles bill, and reaffirmed their former action.

Mr. Chairman, I appeared here three or four years ago in behalf of the Nelson-Corliss bill. At that time I gave some testimony relative to the inroads made upon our business by the private car lines, and the chairman of the committee was anxious to get some information at that time. I think that the events since that time have confirmed my statements, namely, that Armour & Co., and those interests, have gone into the lines of business in which the fruit and produce men are engaged to such an extent that at the present time the car-line company known as "Armour & Co." controls the price of the perishable fruit products of this country; and perhaps no other men have suffered more, and no other business has suffered as ours has, from the exactions and abuses of these private car lines. I take it that whatever bill your committee would see fit to report, if your committee should report a bill, should include a remedy for those abuses.

In 1900—and this was all brought out at the hearing in Chicago in June and in October—these facts were proven. Our fruit is brought from Michigan at one tariff charge, and there was a tariff of \$20 a car for icing. In 1893 Armour came upon the field with an exclusive contract, and at the present time, as appears from the testimony, they will not put their cars upon any railroad without an exclusive contract with that railroad, and instead of having in vogue a rental of \$55 for a car, that enables them with the mileage they receive to charge \$70 a car from Michigan to Boston. At the same time that Armour was engaged in the fruit and produce business he was engaged also extensively in handling pineapples and deciduous fruits, potatoes, apples, and, in fact, almost any kind of fruit in which he thought there was a possibility of making a dollar, so that we have this situation confronting us: Mr. Armour can go into Michigan and buy a carload of potatoes at the same price that I pay there and bring it on to Boston, and the tariff being \$70 a car, he can sell it in Boston and make a profit of \$35, and I would lose \$35 on my carload.

But one of the worst features of that contract was this, that the railroad with which he makes an exclusive contract binds itself to furnish to him full information in regard to every other car on the line. So if I have a car of fruit on the line they telegraph to Armour when that car was shipped, who shipped it, to whom it was going, when it left and when it is due in Boston, and the contents and value of the car, which practically makes the railroads of the country trustees of our business; and it has come to such a pass that the business interests are demanding some relief. It can not go on any longer. We

have either to go out of business or else give up our business to Messrs. Armour & Co.

The CHAIRMAN. Will you explain, now, to the committee how this legislation that you are asking for would relieve this situation that you have spoken of?

Mr. MEAD. It would relieve it in this respect, that other refrigerator cars might be put upon those lines where Armour & Co.——

The CHAIRMAN. But I am asking you now where, under the provisions of this bill, you would get the relief that you seek?

Mr. MEAD. You mean under the provisions of the Cooper-Quarles bill?

The CHAIRMAN. Yes. I understand you to say that your association on Saturday expressed their approval of the Cooper-Quarles bill?

Mr. MEAD. Yes, sir.

The CHAIRMAN. Now, if you will explain to this committee how relief would come to you from the provisions of this bill the committee would be glad to have that information.

Mr. MEAD. I will not read the resolution, because it is the same as we have passed in previous years.

The CHAIRMAN. It is just like a great many of those things we receive from gentlemen who evidently have great interest in this matter and who ask us to vote for this bill. They complain of rebates, and they complain of preferences, and they complain of discriminations, and ask us to vote for this bill that relates solely to rate making. Now, explain to us, if you please, any relation that the provisions in this bill have that would ameliorate the situation that you have complained of.

Mr. MEAD. There is a clause in this resolution, Mr. Chairman, which I will read, as it is very brief:

This exchange also urges that the jurisdiction of the Interstate Commerce Commission be extended to include all charges or practices of refrigerator car lines of other companies or agencies having contracts with railroad companies in respect to care and transportation of freight, vegetables, and farm products: Therefore, be it

*Resolved*, That this exchange hereby respectfully petitions Congress for the passage of the Cooper-Quarles bill or to indicate such legislation as will, in its judgment, accomplish the purpose indicated above.

The CHAIRMAN. Now, you have asked us to pass the Cooper bill as a means of relief, in the alternative of something else, and you have taken an interest in this matter—this is the second time that you have been before the committee—and you have undoubtedly studied this question and ought to know, and we ask you now to inform us how this bill will in any way relieve the situation of which you complain?

Mr. MEAD. The abuse of the private car lines is but one feature of it. We believe that the Cooper-Quarles bill might be amended in the manner to which I have referred.

The CHAIRMAN. Yes.

Mr. MEAD. And that would give adequate relief by making them common carriers, and then they would come under the jurisdiction of the Interstate Commerce Commission. At the meeting in Chicago and at the one recently held there was one of the most flagrant instances of this abuse brought out. There was a charge on a carload

of freight of \$35, and the Armour Company charged under an exclusive contract \$45 to ice and refrigerate that car. The shipper refused to pay it, and they have sued him for it. Now, we claim that the railroad companies should undertake to transport what we give them for shipment in safety.

The CHAIRMAN. There is no doubt about that. No one here will dispute that. Is there not a discrimination there against you and in favor of Armour & Co., and is that not prohibited by law to-day?

Mr. MEAD. Yes, sir.

The CHAIRMAN. And can you not go to-day before the Interstate Commerce Commission and compel them to act?

Mr. MEAD. I do not so understand it. And I want to say this, that the ordinary business man to-day does not propose to spend his time and money in the preparation of a case and take it before the Interstate Commerce Commission when, after everything has been decided in his favor, he has got to go to the courts to have the order of the Commission enforced, as the average time to put a case through the courts after it has been decided favorably by the Interstate Commerce Commission is four years. In the meantime the railroads hold us up and we are subjected to delay and expense; so that at the present time, under the present conditions, we do not feel like bringing a case to take before the Commission.

The CHAIRMAN. Do you expect to get a self-operating law?

Mr. MEAD. No, sir; we ask for this power—

The CHAIRMAN. Are you not asking for such a law as that when you advocate such a law as this will be?

Mr. MEAD. I do not so understand it.

The CHAIRMAN. Every law has to be invoked.

Mr. MEAD. Yes, sir; but may I cite a concrete example of the working of this?

Last summer a session of the Interstate Commerce Commission was held in Boston. We complained of an unfair rate of one of the railroads there from Harlem River to Boston. They charged \$80 on a carload there, and on the same train they brought a carload of beef for \$30. They prorated on the beef and not on the peaches. It did not take the Commission long to determine that that was an unreasonable and unjust rate. They suggested that \$50 would be a just rate. This power that we are asking to have given to the Interstate Commerce Commission is, as I understand, the power to revise an unfair rate, and when the Commission says that \$50 would be a fair rate for a carload of peaches between those two points, that that rate should stand until it has been passed upon by the courts.

The CHAIRMAN. Now, you are talking about an entirely different subject. I can see that this argument is entirely pertinent to your purpose. But you were talking a minute ago about these discriminations in rates, and about the discriminating contracts that were made, and asking us, inferentially at least, to pass this bill as a remedy for that.

Mr. MEAD. One of the reasons for asking for that is illustrated by the statement of Armour's attorney in Chicago. When asked about the rates of the Central Traffic Association Armour said: "We are not amenable to the interstate-commerce law. We send a check to the railroad company to pay the freight, and they take out what they see

fit and turn over the balance to Armour & Co., and we have nothing to say in this matter."

I am simply saying, Mr. Chairman, that something might be added to this bill to cover the private car lines, which constitute the greatest abuse we have and suffer from. Of course, we all recognize the necessity of taking some action as to railroad rates, because we believe unless something is done the business interests of this country will rise up and demand more drastic legislation than is contained in the Cooper-Quarles bill. Within a week I have heard a railroad president in Massachusetts go before a meeting and ask this question: "Do you want the railroad rates all over this country fixed by five men who know nothing about it?" That is not the question at all. That is not what we ask for. What we ask is simply the power to revise an unfair rate, and pending the decision of the court that that rate shall stand; and we feel that circumstances are such that some relief is necessary at once. The interests of the country which we represent are large and great. That is the feeling that we have, that something must be done, and some great relief must be given. We do not feel that this is an unfair bill to the railroads. We have suffered this injustice since 1897, and if all these terrible consequences are going to ensue, such as the railroads claim will ensue, and the mere agitation of this bill is going to bring such results to the railroads, why have they not shown some sympathy for the business men, who have been suffering from this since 1897? We feel that we are entitled to relief, and that at once.

Now I shall be glad to answer any questions.

Mr. RICHARDSON. Did you not read the President's message, and did he not make some reference there to the trouble that you complain of—private cars?

Mr. MEAD. Yes, sir; I think he sees the absolute necessity of action along that line.

The CHAIRMAN. Have you read the bill introduced a few days ago by Mr. Stevens, of Minnesota?

Mr. MEAD. I did not read it carefully. I read it through, but not carefully. I think I know, in a superficial way, what it is.

The CHAIRMAN. Does that meet your approval, so far as you have judgment on the subject?

Mr. MEAD. No, sir; I would rather, at the present, see the Cooper-Quarles bill pass, and then see more time taken for a comprehensive bill that would embrace whatever the situation demanded. But the business interests of the country at the present time almost entirely demand some relief now. We feel that at the present time Armour & Co. are under no regulation whatever. I can not imagine how the railroads of the country have a right to license Armour & Co. to prey upon us, and to transfer the functions of a common carrier to a private individual, practically allowing them to hold us up by the throat and demand what they see fit.

Mr. MANN. Has not the Interstate Commerce Commission held that under the present law it had authority to dispose of that evil?

Mr. MEAD. I think not. I asked Commissioner Prouty at the end of our hearing in Chicago in June as to what relief he could give. He stated that he questioned whether the Interstate Commerce Commission had the power. But the revelations there were so startling

that Congress, he said, could not help but give us relief. The revelations made there and the showing made in that investigation were so startling that he said Congress could not help but give us relief.

Mr. MANN. Did not they hold in that Michigan peach growers' case that they had jurisdiction to continue the case to see whether the railroad companies and the shippers would adjust their differences?

Mr. MEAD. In answer to that I can say the hearing was adjourned from June. The hearing pertained only to Michigan, was limited to Michigan, and the Commission stated at that time, "If you will put in another petition we will open this whole broad question all over the country." They did that, and the second hearing was held in October. The final result of the June hearing was that they would give Armour & Co. until October or November 1, I think, and then if that practice was not discontinued they would take some other action; but no action has been taken up to the present time.

I do believe that the Interstate Commerce Commission have more power than they have exercised. I believe if they had been more aggressive in exercising some of the power that they have it would have afforded us some measure of relief.

Mr. ADAMSON. Armour & Co. use their own cars exclusively to ship over all railroads?

Mr. MEAD. They use their own cars exclusively under these exclusive contracts.

Mr. ADAMSON. The railroads must take their cars and then further their business all the time in the use of them

Mr. MEAD. And if they do not do that they induce the withdrawal of that traffic. They have been able to make some exclusive contracts, as in the case of the Marquette Railroad, for their beef shipments, and whenever they find a weak sister among the railroads they make an exclusive contract with them. In the case of the Marquette Railroad it was shown that they made a low contract over that railroad, though it was not so direct, so as to be able to get their beef in—

Mr. ADAMSON. How far do you think Congress should go in conferring power upon the Interstate Commerce Commission to make or fix rates?

Mr. MEAD. The Interstate Commerce Commission are supposed to represent the public and the shippers; and I understand that when the interstate commerce act was passed it was supposed that they were to pass upon the railroads and the interstate commerce of the country. The President has paid a great tribute to the Massachusetts corporation laws in his desire to extend them to interstate commerce.

Mr. MANN. The Massachusetts laws are not the only thing from your State that the President pays a great tribute to.

Mr. MEAD. Thank you, sir. I understand this, that the Commission has power over interstate traffic. They have now the power to say what is a fair rate, after investigation, and after all interests have been heard, and I do not believe in giving the Commission the power to fix initial rates.

The CHAIRMAN. What do you mean by "initial rates?"

Mr. MEAD. I believe that the railroad companies of the country should fix their rates, as they do at the present time. The traffic managers of the railroads have that in their power to-day, to fix rates, and no one shall supervise them. They can make them as unfair and as

pressly say to me that they think the Interstate Commerce Commission ought to have the power to fix a rate, but they do not wish to confer upon the Interstate Commerce Commission the power to fix railroad rates generally.

Mr. BACON. That is precisely the position of our committee. The fixing of rates generally has never been advocated by the committee, and I do not know that it has been advocated by any body of business men.

Mr. MANN. The power to fix rates is disclaimed generally by your committee?

Mr. BACON. Yes; emphatically.

Mr. MANN. And the power to fix rates is disclaimed generally by the Interstate Commerce Commission?

Mr. BACON. It is; emphatically.

Mr. MANN. You are acquainted, of course, with the case that went to the Supreme Court in which they stated that the Interstate Commerce Commission did not have the power to fix freight rates?

Mr. BACON. Yes.

Mr. MANN. You have read that decision frequently, I suppose?

Mr. BACON. Yes.

Mr. MANN. How many rates did that one decision determine?

Mr. BACON. I could not say definitely. I have the impression that it was somewhere between 200 and 300 rates, but Chairman Hepburn stated that—

Mr. MANN (interrupting). Do you know that that decision fixed the freight rates on every class of commodity, on every article in the southern classification, between Chicago and Cincinnati, and every point in the South, east of the Mississippi River and south of the Potomac and Ohio rivers, that that one opinion and decision did that?

Mr. BACON. I knew it fixed the rates to a large number of points in the southeastern territory. Whether it fixed the rate to all points or not I do not know.

Mr. MANN. Did you know it fixed the rate to every place in the South, south of the Potomac and Ohio rivers?

Mr. BACON. No.

Mr. MANN. And upon every article of freight?

Mr. BACON. It may have been so, and if you so state I shall not question it.

Mr. MANN. Well, the decision of the Supreme Court determines that question. That was under the authority which you are now seeking to put upon the Commission, where in one order they fix the rates to one quarter of the country, as the Supreme Court said, without much hearing.

Mr. BACON. Without what?

Mr. MANN. Without much hearing.

Mr. BACON. The case was a long time before the Commission, I recollect.

Mr. MANN. The Supreme Court said in that case—I never had the pleasure of reading the testimony of the Commission—that there was practically little evidence taken upon the subject of the rates—what should be the rates; and yet in that case the Commission, under the power, which you say you want, to fix a rate, and not rates generally, undertook to fix the rates to every point in the South upon every

article in a classification. Now, do you think they ought to have that power?

Mr. BACON. I will say in reply to that, Mr. Mann, that that embraced the system of rates in effect from Cincinnati and Chicago to points in the southeastern territory, upon merchandise and manufactures, which, on investigation, had been found to be very much higher for a less distance than rates on the same commodities—

Mr. MANN. Oh, well, you are seeking to argue the question as to what rates should go into effect—

Mr. BACON. I am not arguing; I am stating the facts. [Continuing] very much higher than the rates from the Atlantic seaboard to the same points, and in the course of the investigation it developed that those rates had been agreed upon by the several lines interested as a matter of regulating the east and the west bound business with the view of securing through merchandise and manufactures from the East and the agricultural products, necessarily, from the West, in order to afford traffic both ways and give them loaded cars both ways, and they were fixed—

Mr. MANN. So that—are you through?

Mr. BACON (continuing). They were fixed by means of a commission appointed by the several railroads in interest, and from the statements they made it is clear that that was the sole object they had in view in fixing the rates as they did, so very much higher from the western points to the points through the Southeast than from eastern points; and that being the case, the Commission found, when it went into the investigation, that they were unreasonably high compared to rates from the seaboard, and consequently they could do no less than to order them all changed. If, in an investigation of certain rates, there are 200 or 300 or 2,000 or 3,000 found to be wrong, why should not every one of those rates be changed as much as one of them?

Mr. MANN. So that, as a matter of fact, you are in favor of giving to the Interstate Commerce Commission the power to determine the rates upon every article between every point in one complaint?

Mr. BACON. When found upon investigation to be wrong and when related to each other in such a way that they can not be separated.

Mr. MANN. That might cover the whole United States in one complaint.

Mr. BACON. Hardly that.

Mr. MANN. Let us see whether "hardly that" or not. The ground of complaint in the case we refer to, the maximum rate case, was that rates from Western points to the South were too high as compared with rates from Eastern points to the South, as you have said.

Mr. BACON. That was it.

Mr. MANN. Now, when the Interstate Commerce Commission passed on rates from Western points to the South that necessarily affected rates from the Eastern points to the South, did it not?

Mr. BACON. That affected them by making them relatively equal.

Mr. MANN. Oh, it affected them by compelling the railroad companies to change them?

Mr. BACON. To be sure.

Mr. MANN. Which would also require the Interstate Commerce Commission to pass upon whether they were proper rates or not?

Mr. BACON. That is what I mean—



Mr. MANN. That would affect also the rates from New York to Chicago, necessarily?

Mr. BACON. It would have no relation to rates from New York to Chicago.

Mr. MANN. I am afraid you have not studied the rates fully enough, although I will admit, as you say, that you are not an expert.

Mr. BACON. I beg your pardon; rates from New York to Chicago have no relation to rates to the Southwest.

Mr. MANN. I beg your pardon; I say they have a very strong relation. What is the rate on first-class freight from New York to Chicago?

Mr. BACON. I could not say at the moment.

Mr. MANN. I will inform you. Seventy-five cents a hundred pounds.

Mr. BACON. That was my impression, but I was not clear upon it.

Mr. MANN. The rate to every other point between New York and Chicago is based on that.

Mr. BACON. Yes; not only that but the points between the Missouri River and New York.

Mr. MANN. Well, you are mistaken about that, Mr. Bacon.

Mr. BACON. Well, perhaps I am.

Mr. MANN. Rates from New York to Chicago are the basis upon which they make the rates from all other points between New York and a line drawn from Chicago to St. Louis, or the Mississippi River.

Mr. BACON. Yes, sir.

Mr. MANN. That is the case. Now, if the Interstate Commerce Commission endeavors to pass upon a rate from New York to Chicago it must also at the same time pass upon the rate to every other point within that territory, must it not?

Mr. BACON. That of itself would come about; that would be a natural result of it.

The CHAIRMAN. Excuse me. If there is no objection, we will continue at half-past 10 to-morrow morning.

Mr. SHACKLEFORD. I would like to ask one question. You said that this Quarles-Cooper bill was drafted by counsel for the Pennsylvania Railroad after conference with your committee?

Mr. BACON. Not the Quarles-Cooper bill; the original Elkins bill, of which this is a redraft.

Mr. SHACKLEFORD. This is really a redraft, substantially so?

Mr. BACON. Yes, sir.

Mr. SHACKLEFORD. Did the Interstate Commerce Commission enter into the conference in reference to that?

Mr. BACON. No, sir.

Mr. SHACKLEFORD. Were they consulted about it?

Mr. BACON. It is possible they were consulted after it was done, or at least that they were advised of what was done. I think they were, but they had no part in the conference.

Mr. SHACKLEFORD. They had no part in the manufacture of that bill?

Mr. BACON. No, sir; none at all.

Mr. SHACKLEFORD. Were they consulted as to whether it was satisfactory before it was introduced?

Mr. BACON. I think not before it was introduced. That, however,

am not certain about. Excuse me—I recall now the bill was previously introduced before this conference between representatives of Pennsylvania Railroad Company and the commercial organization. Consequently any reference of it to the Commission was subsequent to its introduction.

CHAIRMAN. There is one matter I would like to have you say, if you will. You used the language, "the arrangement that was made with the officials of the Pennsylvania Railroad Company." What do you mean by that?

CON. The individuals?

CHAIRMAN. "The arrangement that was made?"

CON. It was an understanding that was reached at the conference which I have mentioned, a conference for the purpose—

CHAIRMAN. That you would mutually support that bill?

CON. Mutually support the bill, with the distinct understanding that we would not support the pooling section, and that we would oppose it.

CHAIRMAN. That is, you would not oppose it?

Well, we were neutral.

CHAIRMAN. You could not be neutral when you were advocating a bill that contained that clause. You were advocating the bill?

Yes; as a whole.

And then you were advocating the pooling clause as the other clauses?

Never the question was put to us as to that clause being neutral.

Did you want it passed?

Did not care whether that section was passed

or not. It was in there, and to pass the bill it was

necessary to pass the bill as a whole.

We were anxious that the bill should be passed as

it was. We were anxious that the bill

should be passed, not that we

wanted the pooling clause as any other, as a

part, Mr. Chairman. I think I should say that the commercial organizations were in favor of the proposition of pooling, and con-

sequently, were here advocating the pooling clause.

It was not put to the bill.

The arrangement was said more

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Mr. BACON. Well, we were neutral.

The CHAIRMAN. You could not be neutral when you were advocating the passage of a bill that contained that clause. You were advocating the passage of the bill?

Mr. BACON. Yes; as a whole.

The CHAIRMAN. And then you were advocating the pooling clause in that bill as well as the other clauses?

Mr. BACON. Whenever the question was put to us as to that clause we said we were neutral.

The CHAIRMAN. But you wanted it passed?

Mr. BACON. We did not care whether that section was passed or not.

The CHAIRMAN. But it was in there, and to pass the bill it was necessary to pass it.

Mr. BACON. We were willing that it should be passed as a whole.

The CHAIRMAN. You were anxious that the bill should be passed as a whole, were you not?

Mr. BACON. I would not say that. We were anxious that the bill should be passed.

The CHAIRMAN. You were anxious that the bill should be passed, and this was a part of the bill?

Mr. BACON. To be sure.

The CHAIRMAN. This was a part of it, and under that situation you were just as anxious to have the pooling clause as any other, as a whole?

Mr. BACON. I could not say that, Mr. Chairman. I think I should say to the contrary, in fact; that the commercial organizations almost unanimously dissent from the proposition of pooling, and consequently our committee—

The CHAIRMAN. But you, as their agent, were here advocating the passage of a bill that contains the pooling clause.

Mr. BACON. The committee submitted it to the constituent organizations and obtained their assent to the bill.

The CHAIRMAN. You speak of the arrangement made—

Mr. BACON. Perhaps I should have said more properly, "the understanding."

Mr. MANN. This bill says "complaint;" but the interstate-commerce law says that the Interstate Commerce Commission shall have the same power to have an inquiry made on its own motion as it would have if a complaint were filed.

Mr. MEAD. I suppose that if there was a conflict between this bill and the interstate-commerce act it would modify it.

Mr. BACON. May I ask you a question in that connection?

Mr. MANN. Certainly.

Mr. BACON. Do you understand that this power in the present act, given the Interstate Commerce Commission, to institute an action on its own motion, would apply under a case brought under the Cooper-Quarles bill, which confines the Commission to a complaint in its action?

Mr. MANN. No, sir; I do not understand that at all.

Mr. BACON. I inferred that from your question.

Mr. MANN. This bill says "complaint." Referring to section 13 of the interstate-commerce act, we find section 13 of the interstate-commerce act says that the Commission shall have the same power on its own motion as it would have when a complaint was filed; so that the Interstate Commerce Commission under the two laws together, if this be made into a law, would have the same power on its own motion as it has on a complaint.

Mr. BACON. Not by any means.

Mr. MANN. Well—

Mr. BACON. The Cooper-Quarles bill limits the power of the Commission in changing a rate to a case in which there is a complaint and limits it to the complaint made, and it can not go out of that complaint in determining the question.

Mr. MANN. I have not the slightest doubt what the decision of the court would be under the circumstances; that the court would hold that under the two bills the Interstate Commerce Commission had the same power under its own initiative as it had in cases where a complaint was filed, because the law specifically says so. This bill refers to the provisions of section 13 of the interstate-commerce act.

Mr. BACON. The court says, under the present act the Commission has no power to change a rate. Now, this bill confers the power to make a rate. Do you think that they could go further, in the exercise of that power, when the Cooper-Quarles bill does not confer the power to change rates, except upon complaint?

Mr. MANN. The Cooper-Quarles bill says that when a complaint is made, under section 13 of the interstate commerce act, that the power shall be enforced. It confers the power indirectly.

Mr. BACON. But only to the extent that the complaint goes.

Mr. MANN. Not at all. You use the word "complaint" in relation to section 13, and a part of section 13 is this clause, that the inquiry by the Commission shall be exactly the same upon its own initiative as upon a complaint.

Mr. BACON. But the Supreme Court says that the power is limited to declaring whether the existing rate is unreasonable or not, and that it can not go further and say what is unreasonable or not.

The CHAIRMAN. Suppose a complaint should be made under the Cooper-Quarles bill that a rate is unreasonably low, is it your understanding that under this law the Commission would have the power

to investigate that matter, and in case they found that it was unreasonably low to raise it?

Mr. MEAD. I think that if such a case as that should occur—I can hardly conceive of it, but I think if it should occur—it would be only justice to the railroad to make a fair rate. I do not see why they should not have the right, under the construction of the statute given by Mr. Mann, to change a rate under their own initiative. The statute says that the rate must be unreasonable. That is all the business man wants. This question has come to such a pass that we find that relief must be given somewhere. We are looking to this committee to pass a bill that shall not be in conflict with the interstate commerce act. The railroads absolutely hold to-day the power to make or break localities or men without any supervision whatever being given over their rates. We hold that it is an unfair thing to the public, and the Interstate Commerce Commission should represent the interests of the public and of the business community on this question.

Mr. MANN. Do I understand you that the business interests of the country are on the point of ruin?

Mr. MEAD. Many men have been ruined.

Mr. MANN. That is Boston, or generally?

Mr. MEAD. I can cite you to specific instances of the way the thing works.

Mr. MANN. I am talking of business interests generally.

Mr. MEAD. In our business; yes, sir. The Armour Company sent out a notice, dated August 22, that after the 1st of September no goods carried in their cars should be owned by the Armour interests or people. He testified in Chicago that he loaned a man \$400,000 to go into business. He may go into our line of business to-morrow, and cut our throats. He has the power to do it. He has the power to raise or lower these rates absolutely in his own hands. Take, for instance, some shipments to the city of Worcester. Armour & Co. had all the information about those shipments, they knew the time they were shipped and when they were due, and they knew the cost of the car when it was bought in the open market, and if that carload of freight was due on Wednesday, they would put a carload of freight in there on Tuesday and fill the market, and when the carload of freight got in there on Wednesday they found the market cut from underneath them.

Mr. MANN. The tribunal to which you ought to go is not the legislature, but the Executive branch of the Government, because all those things which you have suggested are positively prohibited by law, now under heavy penalties.

Mr. LOVERING. Would the railroads welcome a change regarding the contracts with regard to the refrigerating cars?

Mr. MEAD. I am not, of course, empowered to speak for the railroads. I do know this, that the largest railroads in this country absolutely refused to make an exclusive contract with Armour & Co. They have used all kinds of persuasion and threats with the Pennsylvania and the New York Central railroads. They say "We absolutely refuse to make a contract with you. We believe that we should haul any car or any refrigerator car tendered to us." I have no right to speak for the railroads, but personally I believe that the rail-

roads of the country would welcome such a change and a chance to escape from the domination of Armour & Co. Armour & Co. hold over those railroads to-day the threat of the loss of their business. They say "You must make an exclusive contract with us or you will lose so many carloads a week of freight." Railroads have made exclusive contracts with Armour & Co. under such a threat as that. If the railroad is a comparatively weak one the traffic manager of the road has to have freight or he loses his position. The president of the road has to show results or he loses his position. At the hearing in Chicago the Atchison Railroad put a man on the stand who actually swore that they paid a rebate of 25 cents.

Mr. ADAMSON. You think that they need protection against Armour & Co.?

Mr. MEAD. I think that Mr. Armour uses his immense business to force the railroads into these exclusive contracts.

Mr. ADAMSON. It seems to me that they might, while they are making so many contracts and agreements among themselves, combine against the robber to protect themselves.

The CHAIRMAN. Now, you have spoken a number of times of "exclusive contracts." Do you understand them to be numerous? Are there many of those contracts?

Mr. MEAD. Yes, sir; more than we have any knowledge of. We know of the instance of the Marquette and Michigan Railroad. Those contracts were produced at the hearing in Chicago.

The CHAIRMAN. Do you know of any other exclusive contracts?

Mr. MEAD. Yes, sir.

The CHAIRMAN. Where are they?

Mr. MEAD. In Georgia. There are other refrigerator cars that do the work at less cost to the producer and also with a less consumption of ice. They do work that the Armour Company cars can not do; and yet the shipper can not use those cars because the Armour Company has an exclusive contract. I wrote to the railroad commission of Georgia and asked them if they would furnish me with the names of the roads which had exclusive contracts, and I found that they had exclusive contracts with every railroad bringing peaches out of Georgia. The shippers of Georgia are prevented from getting a better rate and a better car simply because Armour uses no cars but his own.

Mr. ADAMSON. Have you that letter from the railroad commission of Georgia?

Mr. MEAD. That letter is filed with the Interstate Commerce Commission in Chicago.

Mr. ADAMSON. We would like to have a copy of it here.

Mr. MEAD. You can have a copy of it. I have had several letters from them. I had a letter from the secretary of the railroad commission of Georgia, and in one or two instances he simply sent me the letter which he had received in reply from those railroads that had exclusive contracts.

Mr. ADAMSON. If you have a copy of that, I would like to have that filed here.

Mr. MEAD. I will have to send that to you.

Mr. LOVERING. Are these contracts for private cars entirely for refrigerating cars—these exclusive contracts?

Mr. MEAD. Practically so. Armour & Co. some years ago saw the possibilities of getting practically an absolute control of the refrigerator-car service of the country, and Armour to-day practically controls it. He can give us cars or not, as he sees fit. He has it in his power to ruin the shippers of Georgia, so far as their peach business is concerned. He can refuse to-day, under one pretext or another, to put his cars into Georgia.

Mr. LOVERING. And ruin the railroads too?

Mr. MEAD. Yes; and the railroads would have no way to transport that freight to-day from Georgia—that is, in a safe way. They could go back to their box cars, or whatever equipment they might have, and get ready for the service; but there were this last year in Georgia thousands of baskets of peaches which lay on the ground and rotted because the Armour equipment was not there to take care of them. That is, according to their statements. Armour, if he wanted to do so, could go into the market next year and buy up their peaches and shut out those producers. He did that in Michigan. He bought up all the potatoes there. He had the shippers at his mercy, and he could buy the potatoes at his own price simply because they could not get the cars to ship them out except from him.

Mr. TOWNSEND. Are you talking about the testimony given at the hearing up there?

Mr. MEAD. That particular part of it was given there.

Mr. TOWNSEND. Where do you get that particular information?

Mr. MEAD. From potato shippers and from men in the potato business who are unable to get cars. That has all been published in our trade papers, columns and columns of it.

Mr. RICHARDSON. Do you know what would be the freight from Georgia if Armour did not have these contracts? What is the difference between those charges that Armour makes on those refrigerator cars and what would exist if he did not have the contracts? Do the producers suffer?

Mr. MEAD. Of course. The refrigerator car gives them the facility for getting their freight to distant markets, and to get that facility we are willing to pay a fair price. I myself paid \$100 for icing a car from Michigan to Boston. In addition to what Armour got on that he received a mileage of \$25, so that for that one car he received \$125. We claim that that is an exorbitant charge.

Here is another instance. The railroad companies of the country have put all icing facilities into the charge of Armour & Co. Up to within two months Armour & Co. had absolute charge of all icing, by reason of the cars, at Jersey City. It was in the power of Armour to ice a car for me there or not, as he saw fit. He charged me, an outsider, \$5 a ton for icing a car, and he charged the Pennsylvania Railroad \$2.50 a ton. After this hearing this last year the Pennsylvania Railroad saw the injustice of that. There the icing of the produce in every car at Jersey City was in the hands of Armour, and it was a very easy matter for him to forget to ice my car, if he chose to do so, and to send it through in bad condition.

Mr. MANN. Let us do justice even to Armour. Under the contract with the railroad company was he not required to ice that car? You say that he could ice it or not, as he chose.

Mr. MEAD. You can call it a requirement or a privilege. He had



the privilege of charging every other man a dollar and a half a ton on his ice.

Mr. MANN. Was it not in the contract with the railroad company, was there not a requirement that he should ice those cars when they needed to be iced?

Mr. MEAD. I have no doubt of that.

Mr. MANN. He could not do as he pleased about it?

Mr. MEAD. Absolutely as he pleased.

Mr. MANN. By breaking his contract?

Mr. MEAD. He would not have to break the contract. It is very easy for him to forget and let a car go through without being iced. It has been done by competitors, and the car would go to its destination in a worthless condition.

Mr. RICHARDSON. From your statement about the matter is it not manifest that Armour & Co. were carrying that freight from Georgia cheaper than other railroad freights were carried? If not, why did they not go and seek the other railroads which were not under contract with Armour?

Mr. MEAD. There are no other railroads going out of there.

Mr. RICHARDSON. He has got them all?

Mr. MEAD. Yes, sir; Armour & Co. have exclusive contracts with every railroad bringing peaches out of Georgia.

Mr. RICHARDSON. You mean that the railroads go and agree upon a price, and then they bring those peaches out all for the same charge?

Mr. MEAD. The railroads have nothing to do with Armour's charge.

Mr. RICHARDSON. He has got all the railroads?

Mr. MEAD. All of the railroads bringing the peaches out of Georgia; but they have nothing to do with the Armour charge whatever.

Mr. RICHARDSON. He pays the railroads whatever he pleases and fixes the charge?

Mr. MEAD. I do not think you understand the working of it.

Mr. RICHARDSON. I think I do.

Mr. MEAD. Possibly you do.

Mr. RICHARDSON. Yes.

Mr. MEAD. When we receive a carload of peaches, coming from Georgia, our freight bill is rendered to us, \$90, \$80, \$50, \$60, \$70, making in all an aggregate of \$350. When I send my check to the Boston and Albany Railroad they take out their part and pass over to Armour the balance. I have no means of knowing what Armour's charge was. As a matter of fact, on this carload that I spoke of, there was an overcharge of \$3.50 on that car. They rendered me an extra bill afterwards of \$5. They said: "Mr. Mead, this extra \$5 is because the car was diverted." Finally Armour admitted that that was wrong, and they remitted \$5 to me.

What we complain of is that we have no way of knowing the charge. Armour files no price list and no tariff with the Interstate Commerce Commission, and I do not believe that since the Elkins bill was passed these charges have been legally collected. I do not believe that they can charge any more than the tariff filed with the Interstate Commerce Commission. I believe that we can collect those charges.

But the freight charge from Georgia is one question and the Armour bill is another thing entirely. We do not know how much

the charge will be on an Armour car. The rate to Boston is \$60, and that is added to the freight charge, and they could overcharge me \$25 if they saw fit. When my check goes to the railroad company that is taken out and passed over to Armour.

Mr. RICHARDSON. Do you mean to say that you can not protest against that bill?

Mr. MEAD. No, sir. Armour says, "You pay that bill as it is;" and they order the railroad to collect it for them; and this case in Chicago shows this, that an Armour charge was put on a car of \$25 for icing a car, and the freight was \$35, and Armour went to the party and said, "Unless you pay that freight charge you will not be allowed to have credit with the Illinois Central Railroad any longer." The man had paid all that he owed to the Illinois Central. He had paid that bill. He said to him, "I will have you taken off the list of shippers."

Mr. TOWNSEND. Unless he paid the ice bill?

Mr. MEAD. Yes, sir.

Mr. MANN. And did they do it?

Mr. MEAD. Yes, sir; the Illinois Central sent them a letter telling them that they would be taken off of the credit list if they did not, but when they found that Cohen would make a fight they changed that and allowed them to pay the freight bill separately.

The CHAIRMAN. You have spoken of \$100 for icing. What would have been a legitimate charge for that service?

Mr. MEAD. Of course that would require a knowledge of the number of time the car was reiced en route from Missouri to Boston. If you mean the actual charge, that is one thing, and if you mean the charge made by Armour of \$4 a ton or \$2.50 a ton, it would of course make a difference. I should say that \$35 or \$40—\$30 or \$35 ought to cover the cost of icing that car.

The CHAIRMAN. And the rest was extortion?

Mr. MEAD. Yes, sir.

Mr. ADAMSON. I want to understand your statement. As I understand it, you said in effect that you had a statement from the railroad commission of Georgia?

Mr. MEAD. Yes, sir.

Mr. ADAMSON. Stating that every railroad in and out of Georgia—

Mr. MEAD. Not every railroad.

Mr. ADAMSON. All those that handle peaches?

Mr. MEAD. Yes, sir; four railroads handle the peaches from Georgia.

Mr. ADAMSON. Stating that they had contracts with Armour & Co. guaranteeing the exclusive privilege to use their cars furnished by them for hauling peaches out of Georgia?

Mr. MEAD. Yes; and another reads this way: "No other cars will be allowed upon our line." Those railroads are the Southern Railroad, the Central Railroad of Georgia, the Seaboard Air Line, and the Coast Line. Those are the four lines.

Mr. ADAMSON. In your associations, such as you and Mr. Bacon represent, do you have any lawyers among them?

Mr. MEAD. Do we have lawyers?

Mr. ADAMSON. Yes, sir.

Mr. MEAD. Not among our men of business.

Mr. ADAMSON. Do your associations employ lawyers?

Mr. MEAD. Yes, sir; the National League of Commission Merchants had one employed in Chicago. We had one employed on the June case, and also for the October case.

Mr. ADAMSON. Do you not think that if you would employ as good lawyers as the railroads do to look after your interests you would make better progress in forcing existing interests to do what is right than you do?

Mr. MEAD. We find it pretty hard to make headway. Of course the railroads have legal talent employed by the year, and they have the best lawyers that they can get.

Mr. ADAMSON. They employ lawyers and go to the courts, and you demand of the Government to do your litigation?

Mr. MEAD. Not that. But if we have an Interstate Commerce Commission, supposed to represent the shippers and the public, we want that Commission to represent them and guard our interests.

Mr. MANN. You think that the Interstate Commerce Commission ought to be a very active prosecuting body, and also should be the judges of what should be done at the end of their prosecution?

Mr. MEAD. I do not know that the Cooper-Quarles bill embodies that, because the right is given the circuit court to revise. They can simply say, "Pending the situation as it is to-day"—

Mr. MANN. What right is given the circuit court under the Cooper-Quarles bill?

Mr. MEAD. The right to pass on the fairness of a rate. I do not understand that that gives any right to the railroads, under that.

Mr. MANN. The rate goes into effect before the circuit court has a chance to pass upon it?

Mr. MEAD. Yes, sir; they can upset that rate if there is any injustice being done a railroad. They can change it.

Mr. MANN. After a hearing?

Mr. MEAD. Yes, sir.

Mr. MANN. But the rate is in effect already.

Mr. MEAD. Yes, sir. Why should we suffer for four or five years the way we have been doing—

Mr. BACON. The rate is not in effect, as you will recall.

Mr. MANN. I mean that the rate is in effect at least sixty days after the order is promulgated.

Mr. BACON. Thirty days is allowed for review. If no application is made for review, the order is in effect. If application is made for review, then sixty days are allowed. If in the meantime the circuit court reverses the order, that ends it.

Mr. MANN. Of course we all understand very well that the circuit courts of the United States, or any other courts, do not pass upon these great questions which may involve the fixing of rates over a whole territory, in sixty days' time. You say that it takes four years' time to settle one of these cases. Meanwhile a rate would be in effect. So that practically there is no appeal—

Mr. MEAD. I say that the average case, after it has been passed upon favorably by the Commission and taken to the courts for the finding to be enforced—the average time to get a case through the courts is four years.

Mr. RICHARDSON. Right there; is it not a fact that the object that you have in view, and which these associations which you

represent have in view, is to give effectiveness to legislation now existing?

Mr. MEAD. Sure. That is the main object.

Mr. RICHARDSON. That is your object?

Mr. MEAD. Yes. We are not trying to upset any—

Mr. MANN. Just one question. The rate on first-class freight from Chicago to New York or from Chicago to Boston is the same, or what is the difference?

Mr. MEAD. I can not tell you.

Mr. MANN. It is the same. It is a little less to Philadelphia and a little less to Baltimore and a little less to Newport News, which are the great seaboard shipping points. Now, do you think that when a man brings a complaint in respect to the rate from New York to Chicago or from Chicago to New York that the Interstate Commerce Commission on that complaint not only ought to have the power to fix the rate from Chicago to New York, but at the same time to fix an increased rate from Chicago to Boston and a decreased rate from Chicago to Philadelphia and from Chicago to Baltimore and from Chicago to Newport News on all classes of freight?

Mr. MEAD. I do not know that the passage of this bill would change things in that regard. That is a question of differentials between those cities. I do not know that this affects their powers in that regard. That is an indirect matter and a matter upon which I am not very well posted.

Mr. MANN. Do you believe that the Interstate Commerce Commission, on a complaint in reference to rates from Chicago to New York, ought to have the power to increase the railroad rate from Chicago to Boston and make the railroads charge a higher rate from Chicago to Boston than they do from Chicago to New York?

Mr. MEAD. I think if they did, if that bill was passed, they would soon find a complaint made to reduce it.

Mr. MANN. I asked a very simple question and I would like you to answer it. I think it is very important.

Mr. MEAD. It is an easy matter, of course, for the lawyers of this committee to frame these hypothetical questions and put them to us business men, and upon the spur of the moment we can not consider them in all their bearings.

Mr. MANN. I do not wish to embarrass you.

Mr. MEAD. I am not a railroad man or a railroad attorney, of course, and I am very careful about answering those hypothetical questions. They may be designed to draw a special line of answers—

Mr. MANN. That is designed for getting information from a man who has studied the subject. I would like to have your opinion. If you have not an opinion, I do not wish to press you. I would like to have your opinion as to whether the Interstate Commerce Commission, on a complaint concerning rates from Chicago to New York, should have the right on that complaint to say that the rate from Chicago to Boston is too low and to increase the rate from Chicago to Boston?

Mr. MEAD. I do not see how they would have the power, on a specific complaint regarding rates from Chicago to New York, to do that.

Mr. MANN. There is no doubt whatever that they would have the

power under the Cooper-Quarles bill. The question is whether they ought to have the power.

Mr. MEAD. It seems to me that would be a specific complaint as to the rate between Chicago and New York, and not as between Chicago and Boston.

Mr. BACON. The Commission certainly could not go outside of the complaint under the Cooper-Quarles bill.

Mr. MEAD. I do not see how they could.

Mr. MANN. I have studied the Cooper-Quarles bill until I think I know as much about it as anybody else—

Mr. BACON. Could they go outside of the complaint?

Mr. MANN. It would permit anybody to intervene.

Mr. TOWNSEND. Would they not have to make a complaint and have hearings on that particular point you speak of?

Mr. MEAD. Yes, sir.

The CHAIRMAN. It is 12 o'clock. Mr. Dunnigan is here representing Mr. Hearst, and he has a request to make on his behalf.

Mr. DUNNIGAN. Mr. Hearst has a bill pending before the committee and wishes to appear before the committee and briefly present some original information on this, and also to have called some few people who wish to be heard on that bill and on the subject generally. He asks the committee if they will fix a time for that hearing.

Mr. RICHARDSON. We are looking into the whole subject, are we not?

The CHAIRMAN. Yes, sir; certainly.

Mr. DUNNIGAN. Then can you intimate when Mr. Hearst can appear and have his witnesses appear?

The CHAIRMAN. I have just learned that Mr. Spencer, who was to be here to-morrow, can not be here. Mr. Hearst would like to be heard before next week, if possible, when he has something else on his hands; and if the time is not limited he would like to begin next week.

Mr. FAULKNER. Mr. Spencer asked me to come down and state to the committee, Mr. Chairman, that he has been sick in bed for several days, and he said that he would report here this morning. He said that he would come, if it was the wish of the committee, to-morrow, and if it suited their convenience better; but he said that he was very weak and felt that he would hardly do himself justice, having just gotten out of bed, and if the time could be fixed on Thursday or Friday or any day thereafter, so that it would suit the convenience of the committee, he would prefer to appear then.

Mr. MANN. I do not know how far the committee will indulge me, but with the committee's consent I have quite a number of inquiries concerning the terms of this bill which I would like to have elucidated by Mr. Bacon, who I think is the best-posted man in this country on the bill.

The CHAIRMAN. We will go on, then, with this to-morrow, and if there is no objection the Chair would say in response to Mr. Hearst's suggestion that a week from to-day—Monday—we would be glad to hear him. And I would suggest that we hear Mr. Spencer on Wednesday.

Mr. LAMAR. The chairman of the State railroad commission of Georgia has written me a letter, which I received a short time ago, saying that a committee appointed by a commission that met at

Birmingham some months ago desires to appear before this committee in reference to legislation pending to increase the power of the Interstate Commerce Commission.

The CHAIRMAN. Then I would say that on the Tuesday of next week we would hear them.

Mr. DUNNIGAN. I would like to ask if Mr. Hearst can present the subject-matter that he has, and the arguments of attorneys to follow right after?

The CHAIRMAN. The committee will give a week from to-day to Mr. Hearst—give the day's session of the committee to him.

Mr. RICHARDSON. It has been suggested that Mr. Spencer shall be heard on Thursday instead of Wednesday.

Thereupon the committee adjourned until to-morrow, Tuesday, January 10, 1905, at 10.30 o'clock a. m.

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*Original.*

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,  
HOUSE OF REPRESENTATIVES,  
*Tuesday, January 10, 1905.*

The committee met at 10.30 o'clock a. m., Hon. William P. Hepburn in the chair.

**STATEMENT OF MR. E. P. BACON—Resumed.**

Mr. MANN. Before I proceed to ask you about the merits of the bill I wish to confirm the statement I made the other day as to there being a report that Mr. Barry was elected manager of the organization. Of course I have no means of knowing about that, and you have, but the November copy of Freight, which purports to contain a very full account of the proceedings, makes that statement. I do not know whether that has been called to your attention or not.

Mr. BACON. As I stated the other day, Mr. Barry was elected by the executive committee after the adjournment of the convention, and there was no reporter present. Mr. Barry was elected secretary.

Mr. MANN. And the report in Freight says, after stating that Mr. Barry was elected secretary:

Mr. Barry was also elected manager of the organization at Washington.

Mr. BACON. There was no election that termed him manager. There was no other election than that which I mentioned.

Mr. MANN. That is an erroneous statement by the reporter in Freight?

Mr. BACON. Yes. It was expected, as I said before, that he would be present at Washington and look after legislation in behalf of the executive committee.

Mr. MANN. In order that you may set yourself right before the committee in reference to the other statement in Freight, I read to you from the same report in Freight—referring to the statement that you were credited with saying that three-fourths of the Representatives in Congress owed their presence there to the influence of the

railroads—what purports to be a direct quotation of your words on this subject:

These Representatives are there to represent the railroads, and that is what we have to contend with in advocating reform legislation.

They put that in your mouth, using quotation marks, in this same report. If you care to say anything on that subject, I would be glad to hear it.

Mr. BACON. Those remarks having been wholly extemporaneous, I have no means of confirming or denying that statement.

Mr. MANN. You may have made that statement?

Mr. BACON. My recollection is not distinct in reference to it.

Mr. MANN. You do not wish to deny that you made the statement?

Mr. BACON. I have stated exactly the position in which it lies in my mind. If I had a distinct recollection in regard to it I would be very glad to give it to you in full. Anything I say I am prepared to stand by, but whether I said that or not I can not now say.

Mr. MANN. Now, do you believe that that is true—that that is a fact, I mean?

Mr. BACON. I do not, to speak candidly; I do not think I made such a remark. And I will say further that I have not had such an idea; I have not been possessed with such an idea.

Mr. MANN. I am frank to say to you that I was very much surprised that such a remark should be credited to you, because I have never found that you were in the habit of making statements of that sort.

Mr. BACON. You know how fond reporters are of changing what is said into something sensational, giving it a sensational effect, and I attribute this to that tendency.

Mr. MANN. Of course we all know that a reporter never misses an opportunity of changing language if the change will make a sensation.

Mr. BACON. That is what I refer to.

Mr. MANN. That is a part of their business.

Mr. BACON. I hope the reporters will pardon the allusion. They doubtless recognize the fact of it.

Mr. MANN. In the testimony which Mr. Kernan gave to this committee two years ago he made a statement like this: That there was no intention to ask that the Interstate Commerce Commission should have any authority over rates "except when its intervention is sought to pass upon a rate already made by the carrier and challenged by formal complaint." That, I understand, is still your position in a way?

Mr. BACON. That expression is used often in referring to this legislation and the word is used in its generic sense. I have often used it myself. The President used it in his message—a rate, "a rate that is challenged." But we all understand that when any rate is challenged there are liable to be rates so related to it that they must be combined with it.

Mr. MANN. The New York Board of Trade and Transportation, if I remember rightly, originally passed a resolution in favor of the Cooper-Quarles bill, or something of that sort.

Mr. BACON. No, sir; they never have.

Mr. MANN. At any rate, they adopted a report adverse to it, and I thought that they had reversed their opinion.

Mr. BACON. They adopted a report at a meeting about ten days ago, at which I had the honor of being present, criticising the Cooper-Quarles bill on account of certain language used in it which was not satisfactory to them. If you wish me to go into the details of that I will do so; but it seems to me to be a waste of time. But they did not declare against the bill as a whole.

Mr. MANN. What I wish to get at is this—and I consider you the ablest man upon the subject in the country—

Mr. BACON. I disclaim anything of that kind, Mr. Mann.

Mr. MANN. I want to get at the distinction between what the shippers are asking for and the powers which would actually be conferred by the language of the Cooper-Quarles bill, in the hope that with your assistance and with your knowledge we may be able to work out a measure in proper language which will fulfill the expressed wish of the shipping public.

Mr. BACON. I will be very glad to cooperate in that effort.

Mr. MANN. Now, the editor of Freight, I assume, speaks for the shippers, or at least he admits that he does. In referring to the action of the New York Board of Trade and Transportation he made this remark:

The objection raised against the proposed bill to amend the interstate-commerce act, as introduced by Cooper, of Wisconsin, is frivolous, in that it recites, incorrectly, that such legislation would confer the rate-making power on the Commission.

Mr. BACON. Mr. Mann, I beg to say that our committee is not in any way responsible for utterances in Freight or communications made to that publication.

Mr. MANN. I am not holding you responsible for anything there. What I want to find out is what the fact is. They say that the objection is frivolous, that it does confer the rate-making power on the Interstate Commerce Commission. Now, I understand from your language that you are not in favor of conferring generally upon the Interstate Commerce Commission the rate-making power.

Mr. BACON. The primary rate-making power, no. And I know very few men in the country that are in favor of it.

Mr. ESCH. That is, you do not want to give the Commission the initiative?

Mr. BACON. The initiative of making rates, no. I do not think there are ten men in this country, at least there are not ten men in this country within my acquaintance that desire anything of that kind. They simply desire that the power to correct the rate when it is questioned shall be vested in some competent body, and that the correction when found necessary can be immediately put into effect—that is, within a reasonable time.

Mr. MANN. The chamber of commerce of the city of Milwaukee has filed with this committee a copy of a resolution passed by it on this subject. One resolution reads as follows:

*Resolved*, That the chamber of commerce of the city of Milwaukee hereby petitions Congress to enact legislation empowering the Interstate Commerce Commission to determine, upon full hearing of all parties in interest, what change shall be made in a rate or practice found to be discriminative or unreasonable.

With the committee also is a very large number of resolutions passed by various organizations throughout the country, all in identi-



cally the same language, asking that the power be conferred upon the Commission to change, upon full hearing, a rate or practice. Now, do you understand that that means the power to change rates generally?

Mr. BACON. It means the power to change a rate complained of, and if more than one rate is included in the same complaint, necessarily that it shall pass upon those.

Mr. MANN. The President in his message to Congress made this statement:

I do believe that as a fair security to shippers the Commission should be vested with the power where a given rate has been challenged and after a full hearing found to be unreasonable, to decide, subject to judicial review, what shall be a reasonable rate to take its place.

Do you understand from that language that the President means that the Interstate Commerce Commission shall have the power to change any number of rates upon one petition which the petition chooses to allege are unreasonable?

Mr. BACON. Mr. Mann, it necessarily follows that a number of rates involved in a particular rate complained of can be embraced and will be embraced in the same complaint, and if embraced in a complaint that the Commission can act upon and change them all. Everybody understands that. The commercial organizations have at least that idea and that expectation—that desire.

Mr. MANN. Do you think the President understood that when he said "to change a given rate and fix what shall be a reasonable rate to take its place," that he meant any number of rates, from 1 to 10,000?

Mr. BACON. I think the President had the same idea which I have stated to be the idea of commercial organizations; and I will say in that connection that I have had a number of interviews with the President during the last three years, probably not less than a dozen, and I think I know his mind very well.

Mr. RICHARDSON. Do you not think a fair and reasonable construction of that would be "rates related to each other?"

Mr. BACON. I think the Interstate Commerce Commission would not entertain a complaint that combined rates that had no relation to each other. I think if such a complaint were made it would be referred back for correction.

Mr. MANN. You sent out, I believe—you or the secretary—a synopsis of the Quarles-Cooper bill to various organizations—shipping organizations, freight organizations, mercantile organizations, etc.—throughout the country. Is not that the case?

Mr. BACON. We did; yes, sir.

Mr. MANN. Do you know whether this is a copy, an original copy, or a copy they printed of your synopsis? [Handing a paper to Mr. Bacon.]

Mr. BACON (after examination of paper). I do not.

Mr. MANN. That came from the Illinois Manufacturers' Association.

Mr. BACON. I could not say whether it corresponds with the one that was issued by the committee or not.

Mr. MANN. I may say I do not know whether it does or not, but the Illinois Manufacturers' Association sent to me for the Cooper-Quarles bill after they published this synopsis or sent it out, and I

presume they must have gotten the synopsis from some other source than the bill itself.

Mr. TOWNSEND. Is there not a way to get that synopsis, a true copy of it, if it is material?

Mr. MANN. I do not know that it is material at all. I simply wish to know whether this was what was sent out.

Mr. ADAMSON. I think we may assume it.

Mr. MANN. In the Cooper bill itself it says "rate or rates" in referring to the power of the Commission. The synopsis which was sent out gives to the Interstate Commerce Commission authority in this language:

Declaring any existing *rate* or regulation or practice affecting such rate complained of, and declaring what *rate*, regulation, or practice would be just and reasonable.

Now, in sending out a synopsis of the bill of that sort, would there be any special reason for cutting out the word "rates" and conveying the impression to an ordinary grammarian that you only intended to fix a special rate, and not confer power to fix rates generally?

Mr. BACON. I can not say whether this corresponds to the synopsis prepared by the committee or not, but if it does I should say that the common use of the term "correcting a rate" would be the reason for using that term in a synopsis. Whether it was done or not I don't know. If it was done it was not done, I should say, with any intention to mislead or with any expectation that there would be any misapprehension in regard to it.

Mr. MANN. You think it would not be misleading at all, as a matter of fact?

Mr. BACON. No, sir.

Mr. MANN. But still in the bill you take care to put in the word "rates" for fear it would mislead the courts?

Mr. BACON. When you prepare a bill you have to be careful to put in every word to avoid any misconstruction. When you prepare a synopsis you make it as short as possible.

Mr. MANN. The synopsis covers all that the bill covers in this respect, except you leave out the plural. Otherwise the synopsis in those provisions is as long as the bill.

Mr. BACON. It was intended to convey an exactly correct idea of every provision of the bill, and if the omission of the pluralizing of the word "rate" was made it was done without any thought that by any possibility anybody would have any misconception as to the meaning. Shippers and receivers everywhere use *rate* commonly to express *rates* in general.

Mr. Barry suggests to me that I wrote the synopsis, which was issued by the committee, myself.

Mr. MANN. With all due respect to you, that would not affect the question as to whether it would, in fact, convey a wrong impression, leaving out the very important and vital thing in the bill as to whether the power to fix rates should cover rates generally or whether it should cover *the* special rate complained of. Can not you see a vast difference between the authority to fix a rate and the authority to fix rates generally?

Mr. BACON. I can not see a particle of difference, because the power to fix a rate involves the power to fix rates brought before the Commission for consideration, related to the rate complained of.

Mr. MANN. In your statement two years ago before the Senate committee the question was raised as to the extent of the order to be made by the Commission under the Nelson-Corliss bill, and this question was asked you and you made this answer [reading] :

Senator DOLLIVER. Does the order of the Commission contemplated here apply to the individual only or to the classification?

Mr. BACON. Simply to the individual complaint. The complaint may, however, be in relation to an unjust and unreasonable rate or to an unjust and unreasonable classification.

The Commission takes into consideration the relation of that rate to other rates and determines largely upon that relation as to the reasonableness or unreasonableness. It has no power to order a general reduction. It can only order a change in a particular rate complained of in each individual case. The Commission can go no further than to change the rate in the particular instance where complaint has been made.

Mr. MANN. Now, did you intend to convey the impression by that testimony that the Interstate Commerce Commission should have authority to lower a whole lot of rates?

Mr. BACON. I had no distinction in my mind whatever between the words "a rate" and "rates."

Mr. MANN. When you say in your testimony "authority to change the particular rate complained of" you mean by that authority to change all the rates which may be named in the petition?

Mr. BACON. In the complaint; yes, sir.

Mr. MANN. Without regard to the number?

Mr. BACON. Without regard to the number; yes, sir. Subject to the discretion of the Commission, whether they have a definite relation to each other, and should be considered together.

Mr. MANN. By what authority does the Commission determine the discretion?

Mr. BACON. The law fixes the scope of complaint.

Mr. MANN. That is not discretionary with the Commission—as to what jurisdiction each shall maintain?

Mr. BACON. It is discretionary with the Commission whether it shall take up a complaint or not.

Mr. MANN. Where do you find that in the law?

Mr. BACON. In the original act.

Mr. MANN. In what way is it discretionary? The original act gives a shipper absolute authority to file a petition. The Commission has no discretion as to whether it shall maintain jurisdiction over that.

Mr. BACON. In section 13 of the act it does provide, if in the judgment of the Commission it is thought best to investigate the matter—some language to that effect.

Mr. MANN. That is an investigation on the Commission's own motion.

Mr. BACON. I think it relates to the whole thing.

Mr. MANN. I think when you read it you will change your mind, because it only relates to an investigation on the Commission's own motion. There is no discretion given to the Commission as to whether it shall entertain a petition filed by a shipper, or an association or an organization or anybody else, almost.

Mr. BACON. I would like to have section 13 of the act read.

Mr. MANN (reading) :

That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

Mr. BACON. Does not that clause which says that they may conduct the investigation in such manner as they deem best give them discretion?

Mr. MANN. As to whether they shall conduct an investigation at all?

Mr. BACON. Yes.

Mr. MANN. It certainly does not, Mr. Bacon.

Mr. BACON. Is not the discretion vested in a court in relation to a complaint sufficient to warrant the Commission in doing the same thing?

Mr. MANN. The court has no discretion as to whether it shall hear a lawsuit or not.

Mr. BACON. But it often requires a complaint to be amended.

Mr. MANN. It permits a complaint to be amended, but the complaint must show upon its face, otherwise the Commission is not required to proceed. But when the complaint shows an evil on its face, within the provisions of the law, it is made the duty of the Commission to investigate.

Mr. BACON. I think that same discretion would give the Commission authority, if it deemed the complaint unduly extensive and containing points that did not properly relate to each other, to refer it back for amendment. I think the discretion vested in the Commission in relation to investigations is broad enough to admit of their doing that.

Mr. TOWNSEND. Mr. Mann, what does that sentence mean there—

If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, etc.

Who is to judge whether there is any reasonable ground?

Mr. MANN. That is a matter to be decided on the face of the complaint as to whether a violation of the law is made out upon the face of the complaint.

Mr. ADAMSON. Whether it states the case?

Mr. MANN. Yes; or if at any time on the proof it should appear that there was no case they could abandon it if they wished to. But

certainly nobody proposes to confer on anybody the absolute authority to determine for itself whether it shall favor one shipper and refuse to hear the case of another shipper.

Mr. BACON. No; but it may enter into the details of the complaint, and if it regards it as inconsistent or unreasonable it can certainly refer it back and require it to be amended.

Mr. MANN. Undoubtedly there is no question about the power to amend.

Mr. BACON. The Interstate Commerce Commission is supposed to be a body of discretion and judgment, and it is not likely that it would entertain any such ridiculous complaint as would involve rates that had no relation to each other.

Mr. MANN. That would bring up the question—which I do not wish to take up just now—as to whether all rates do not have some relation to each other. In your judgment the Interstate Commerce Commission also uses the singular where it means the plural—because in their last report they say that what they want is authority to correct the rate, “upon proof that a particular charge is greater than should in reason be exacted.” You think by that that they mean the power to fix rates generally and not confine themselves to the particular charge?

Mr. BACON. I think they use it in the generic sense, the same as I have referred to; but the Commission can not entertain any rate not included in the complaint, and it can not make a change in the rate of its own volition, but simply upon the testimony that is produced, which indicates the necessity of making the change.

Mr. MANN. The Interstate Commerce Commission in its last report also uses this language in another place, stating what authority they want:

The Commission may find after careful and often extended investigation that a rate complained against is unreasonable and order the carrier to desist from charging that rate for the future, etc.

You think that language means not *a* rate or *the* rate, but *rates* generally?

Mr. BACON. I think it is necessarily implied, Mr. Mann, that if a rate is susceptible of correction that any rate is, or any number of rates are that may be properly embraced in the case.

Mr. MANN. They also say in their last report that they ought to have authority to direct a railroad company to cease and desist from charging *the* rate complained of, and to substitute therefor *a* rate. You think that also refers—

Mr. BACON. Has the same meaning exactly.

Mr. MANN. It seems to be very unfortunate that these officers of the Government have not studied the use of the English language.

Mr. BACON. It is the common use of the term between shippers and railroad men and members of the Commission and everybody that has anything to do with it.

Mr. ESCH. As a matter of practice in the decisions of the interstate commerce court heretofore—

Mr. BACON. You mean the Interstate Commerce Commission?

Mr. ESCH. Yes. When the rate was complained of before have they gone into a decision of schedules or have they confined themselves practically to the rate complained of?

Mr. BACON. They have confined themselves to the complaint.

Mr. LAMAR. What would be the difference between filing one petition complaining of 50 rates and filing 50 petitions complaining of 50 rates? Why not challenge them in one petition?

Mr. BACON. There would be no difference, but it would be a great deal more sensible——

Mr. LAMAR. I ask this in view of the objection raised by Mr. Mann. Would not the power of the Commission be as comprehensive in one case as in the other? What would be the difference between filing one petition containing 50 complaints and filing 50 petitions containing 50 complaints?

Mr. BACON. There would be no difference, but I have no idea of having rates treated in that way.

Mr. SHACKLEFORD. Under the power of the Commission, would the Commission have a right, if this bill became a law, to raise a given rate in order to equalize the rates between cities or communities and railroads?

Mr. BACON. I could not pass upon that question, but I doubt very much whether they would ever feel justified——

Mr. SHACKLEFORD. Not would they feel justified in doing it, but would they have authority to do it? Under the authority proposed, would the Commission have the right to raise rates on one line in order to equalize it with other lines?

Mr. BACON. I can only say in relation to that that the practice——

Mr. SHACKLEFORD. I don't care for the practice; I only want to know what power they would have under this law. Would the power be there to do that?

Mr. BACON. It might be inferred. When two rates have been complained of as unjust——

Mr. SHACKLEFORD. We are trying to get some light on this in order to know how to vote on the bill. I would like to know whether this power conferred on the Commission that is sought here would give the Commission a right under certain circumstances to raise rates.

Mr. BACON. I would say in reply to that that the only parties authorized to bring complaints——

Mr. SHACKLEFORD. I am not talking about who are authorized to bring complaints, but what authority——

Mr. BACON. Please hear me through.

Mr. SHACKLEFORD. What power the Commission would have.

Mr. BACON. The only parties authorized to bring complaints are individuals, corporations and associations, and other organizations of that kind, and those complaints will always be for the reduction of rates. There is no authority given in the act for the railway company to come in and complain that a rate is not high enough and ask the Commission to raise it.

Mr. SHACKLEFORD. Suppose it should be complained that the rate on lumber from Eau Claire to some given point was too low as compared with the rate from La Crosse. Under that would the Commission have the right, under the power sought to be given it, to raise the rate from one point to equalize it with the other?

Mr. BACON. I would say that in the Eau Claire case the Commission ordered the adjustment of those rates by the lowering of the higher rate.

Mr. SHACKLEFORD. In that case the higher rate was lowered?

Mr. BACON. Yes, sir.

Mr. SHACKLEFORD. But in the case that one rate was complained of as being too low, how would the Commission remedy a condition of that sort?

Mr. BACON. That is provided under this bill that is proposed. They can not under the present law.

Mr. SHACKLEFORD. How would they do it?

Mr. BACON. We can only judge how they would do it by what they have done. They have always done it by reducing the higher rate. This bill provides that the Commission shall declare what the rates shall be from each point in question, not declaring the difference—or, rather, it does provide that after it declares the difference if it becomes necessary to fix it absolutely from each of the points in question it is authorized to do that.

Mr. SHACKLEFORD. Then would a railroad that lowered that rate infract the law?

Mr. BACON. It certainly would.

Mr. SHACKLEFORD. It confers power, then, on the Commission to raise rates above what the railroads put them at?

Mr. BACON. Not by any means. I would like you to repeat that last remark.

Mr. SHACKLEFORD. The question I asked was whether this power conferred upon the Interstate Commerce Commission would give it the right to raise rates in a case, or to forbid the railroads from lowering its rates—in the Eau Claire and La Crosse case, for instance.

Mr. BACON. After it has fixed the proper relation of rates from two points—

Mr. SHACKLEFORD. I mean in order to preserve what they determine to be a fair adjustment, would they say to one railroad, "You bring your rate down to this point," and to the other railroad, "You bring your rate up to this point"—would they have authority to do that under this bill?

Mr. BACON. They would have authority under this bill to fix the two rates and to require those two rates to be observed. And if after fixing those rates one of the railroads should go below it it would have to come before the Commission again.

Mr. SHACKLEFORD. Then if the Eau Claire rate was as low as it ought to be and the La Crosse rate was still lower, what would the Commission do to adjust that?

Mr. BACON. It would require the observance of the rate it had previously fixed.

Mr. SHACKLEFORD. If the rate was lower than that rate they would compel it to come up to it then?

Mr. BACON. I don't think so. They never have done that.

Mr. SHACKLEFORD. How would they get out of that situation, then?

Mr. BACON. I have reference to that Eau Claire case; I have studied that.

Mr. SHACKLEFORD. I would like to get at that—where a rate is fixed and the railroad fixes a still lower rate, how would you preserve that adjustment?

Mr. BACON. By observing the rate the Commission has fixed.

Mr. SHACKLEFORD. Supposing the rate is below that, how would you adjust it?

Mr. BACON. If they are required to observe the rate which the Commission fixes it can not be made lower.

Mr. SHACKLEFORD. Suppose they do make it lower?

Mr. BACON. Then they would be disobeying the law.

Mr. RICHARDSON. You are talking about the difference in "rate" and "rates." Is it not a fact that you have some precedent established by the Interstate Commerce Commission prior to the maximum-rate decision in 1897 that throws some light on this?

Mr. BACON. Yes, sir.

Mr. RICHARDSON. Did not Judge Cooley and other members of the Interstate Commerce Commission, before that maximum-rate case was decided, hold or give orders directing what rates should be maintained?

Mr. BACON. There were some cases in which they did that; yes, sir.

Mr. RICHARDSON. And did they have any regard to what the technical difference is between "rate" and "rates?"

Mr. BACON. I never heard the question raised in any discussion on the subject.

Mr. RICHARDSON. By Mr. Cooley or Mr. Schoonmaker or any of those men?

Mr. BACON. Never.

Mr. RICHARDSON. Where a rate had been inquired into and they had held it to be unreasonable and unjust and unfair, they directed what the rate should be, and no question was ever raised as to the technical difference between "rate" and "rates?"

Mr. BACON. I never heard it raised before anywhere.

Mr. RICHARDSON. And those directions made by Cooley and Schoonmaker and others had reference to the relation or dependence of rates upon each other?

Mr. BACON. Yes, sir.

Mr. RICHARDSON. It was not as to a single rate, but as to whether it related to all the rates that involved that particular one on that railroad?

Mr. BACON. In one of the other cases when Judge Cooley was Commissioner, relating to rates from points in Minnesota, variously 30, 40, or 50 miles from the Mississippi River, the Commission made an order that the rates on that whole line of road to Milwaukee and Chicago should not be more than  $2\frac{1}{2}$  cents higher than rates from points on the river which it paralleled, and it involved a reduction of 5 or 6 cents a hundred in some cases, and it included 50 or more rates.

Mr. RICHARDSON. And the opinion that you have given in answer to Mr. Mann's technical questions as to the difference between "rate" and "rates" is based upon the knowledge that you acquired from those orders made at that time?

Mr. BACON. Those are included in my mind; yes, sir.

Mr. STEVENS. I would like to return to the question brought up by Mr. Shackelford for a moment. You recall the statement made by Judge Prouty, as I remember it, that there existed a certain condition in the oil traffic between Cleveland, Ohio, and New Orleans and Chicago, Ill., and New Orleans. In Cleveland there are quite a number of independent refiners. In Chicago the refinery is owned by the Standard Oil Company. The rate from Cleveland to New Orleans, as I recall it, was, say, 26 cents a hundred, which was a fair and rea-



sonable rate. The rate from Chicago to New Orleans was 24 cents, which was an unduly low rate. The freight on other articles of about the same class was at the same rate between Chicago and New Orleans and Cleveland and New Orleans. As I recall what Mr. Prouty said, he instanced that as one of the cases where the schedule discriminated in favor of the location of the Standard Oil Company and against the location of the independent oil refiners. He stated, as I remember, that that rate of the independents between Cleveland and New Orleans was a fair, reasonable, and just rate, and that the other was too low a rate. What would you think ought to be done or could be done under this bill in that sort of a case?

Mr. BACON. That is a pretty difficult question to decide.

Mr. STEVENS. I am giving you the statement that Judge Prouty makes. Now, I would like to have your opinion of what could be done in that hard case under this bill.

Mr. BACON. I think what would be done would be the reduction of the higher rate.

Mr. STEVENS. But he stated that that rate of 26 cents between Cleveland and New Orleans was a just, fair, and reasonable rate. Now, is there any authority under this bill to reduce a fair, just, and reasonable rate?

Mr. BACON. There is authority to adjust relative rates, making them relatively just.

Mr. STEVENS. I am asking you how it could be done. Here is a rate that is a fair, just, reasonable rate, a rate of 26 cents. Now, that rate is guaranteed to that carrier under the Constitution, is it not? He is entitled to a just, fair, and reasonable rate under this bill or any other, is he not?

Mr. BACON. The Commission is absolutely clear about that point.

Mr. STEVENS. I am stating what Judge Prouty said—that that was a fair, just, and reasonable rate. Assuming that, the carrier is entitled to it, is he not?

Mr. BACON. Unless injustice is done by it to some other locality.

Mr. STEVENS. Is not the carrier entitled to a just, fair, and reasonable rate as a fair compensation for the work that it does?

Mr. BACON. It is as a whole; but one rate taken out of a dozen rates, the change of one rate by 1 cent or 2 cents per hundred pounds would be likely to divest the carrier of a reasonable profit.

Mr. STEVENS. Now I am asking you here about two rates. One is stated by the Commission to be, in its opinion, just, fair, and reasonable, and the carrier is entitled to it. The other is unduly low and unreasonable, whereby the preference is given to a particular community and a particular part of the country. Now, how would that be decided under the bill under consideration?

Mr. BACON. I think that it would be, unquestionably, decided by the reduction of the higher rate.

Mr. STEVENS. Even though the higher rate was fair, just, and reasonable, and such action would take away the compensation of the carrier without just compensation?

Mr. BACON. No. It is not supposable that the change of one rate out of a dozen will divest the carrier of its proper return on its investment; and if injustice is effected by the continuance of that rate, it is certainly within the power of the Commission to reduce that rate.

Mr. STEVENS. The tariff on oil was 26 cents, which was just, fair, and reasonable, in the opinion of the Commission. You would adjust that, and take off 2 cents, for instance, and put that on other commodities which are also paying a fair, just, and reasonable rate?

Mr. BACON. I can hardly conceive of a case where it would be necessary to do that.

Mr. STEVENS. If a carrier is receiving fair, just, and reasonable rates, and you reduce one rate, that reduction has got to be made up by an addition being made to some other rate, has it not, in order to insure to the carrier a just, fair, and reasonable compensation?

Mr. BACON. Unless there is sufficient margin in its profits to admit of that reduction.

Mr. STEVENS. But suppose that a rate is fair, just, and reasonable, and you should reduce it, you would place the amount of the reduction somewhere else, would you not, in order to insure that carrier just, fair, and reasonable rates?

Mr. BACON. I do not think it would be necessary.

Mr. STEVENS. In other words, you are not willing to admit that there is any power given under this section 1 of the Cooper bill to raise rates, even though a rate is unjust, unduly low, and discriminatory, because it is too low?

Mr. BACON. Whether the power exists I can not say, but as I have said before, I am not clear. But I am clear in the opinion that it would never be exercised.

Mr. STEVENS. Even in a case like this I have cited?

Mr. BACON. No, sir.

Mr. ADAMSON. Do you think that a rate is ever found too low?

Mr. BACON. It never has been ascertained yet how low freight can be carried and still give a fair profit to the carrier. That is one of the unknown things.

Mr. CUSHMAN. Referring to the matter that Mr. Stevens has spoken of, the rate of 26 cents being a just and reasonable rate, and assuming the rate of 24 cents to be too low, it is your opinion, as I understand, that the Commission in a case of that kind would lower the higher rate of 26 cents to 24 cents. Did I correctly understand you?

Mr. BACON. I think that would be the probable result.

Mr. CUSHMAN. If that were done, and the railroad companies then lowered that 24 cent rate from Chicago to 22 cents, leaving the difference existing as it did before, what would then be done in that case?

Mr. BACON. That could not be done, because the Commission would issue an order fixing the two rates, and requiring that each of the parties involved should adhere to those rates under this bill.

Mr. SHACKLEFORD. In the case supposed by Mr. Stevens, the Cleveland rate being a reasonable and fair rate, and the Commission reducing it below what was reasonable and fair, and an appeal being taken to the courts, what would the courts do with that decision of the Commission, it being conceded that they had reduced the rate below what was reasonable and fair, what would be done in that case?

Mr. BACON. If the courts found that that was an unfair rate—

Mr. SHACKLEFORD. It being conceded, you know, that the rate was reasonable and fair.

Mr. BACON. If the court should find that the result of that reduc-

tion was to prevent the corporation from having a proper return on its capital invested it would undoubtedly nullify it.

Mr. STEVENS. Just one more question. If a corporation was making a just, fair, and reasonable rate in competition with a corporation that was making an undue and discriminatory rate, you would punish the company that was obeying the law instead of the corporation that was violating the law?

Mr. BACON. I do not conceive that such a result is likely to occur. I hold that railway companies, doing a public service, are in duty bound to see that no injustice is done in the operation of their rates with reference to any particular point or any particular commodity. Now, I have argued in the matter of the flour and wheat differential that even if the railroad company can not carry flour as cheaply as it can wheat, if it interferes unjustly with a manufacturing industry, an important manufacturing industry of this country, the company should submit to the equalization of the rates on the ground of its being possessed of valuable franchises which it has received from the public and on the ground that it is performing a public service, and that that service must be done not only without injustice between individuals and localities, but without injustice to commercial and manufacturing interests of the country.

The CHAIRMAN. Even though it imposes an injustice on the carrier?

Mr. BACON. Though it imposes a hardship in a single instance. You must take the average result, the average return, and action should not be based on one or two exceptional cases.

Thereupon the committee adjourned until to-morrow, Wednesday, January 11, 1905, at 10.30 o'clock a. m.

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WEDNESDAY, *January 11, 1905.*

The committee met at 10.30 o'clock a. m., Hon. William P. Hepburn in the chair.

**STATEMENT OF MR. FRANCIS B. THURBER, PRESIDENT OF THE UNITED STATES EXPORT ASSOCIATION.**

Mr. THURBER. I would state, Mr. Chairman and gentlemen, that I represent directly merchants and manufacturers who are members of the United States Export Association, some 220 in number, and situated in 34 States, that differ with Mr. Bacon and other supporters of the Cooper bill (H. R. 6273), and in order that I may not waste your time I have boiled down on paper a statement which I will read to you, because it may suggest some questions that members of the committee would like to ask me.

I represent directly merchants and manufacturers who are members of the United States Export Association, and indirectly the great majority of shippers in the United States, who, while opposed to unjust discriminations by railroads, are not prepared to adopt the remedy proposed by the advocates of this bill.

Mr. BACON. May I interrupt you to ask a question—because it will, perhaps, save time. I would like to know by what authority Mr.

Thurber assumes to represent the shippers of the United States generally.

Mr. THURBER. I say indirectly.

Mr. BACON. In what manner indirectly?

Mr. THURBER. Based upon my knowledge of the situation.

Mr. BACON. And it is your individual assumption?

Mr. THURBER. Yes; it is an assumption on my part, so far as I say that I represent the shippers. I represent them indirectly.

Mr. MANN. You do not pretend to be their authorized representative?

Mr. THURBER. No, sir.

Mr. MANN. The authorized representative of any commercial agencies or bodies or anything of that sort, do you?

Mr. THURBER. Excepting—

Mr. MANN. Except the United States Export Association?

Mr. THURBER. That is all, sir; and them I represent by resolution, which appears in this paper, and also I quote from the expressions of other commercial bodies that sustain my view.

I doubt if 10 per cent of its friends have given any serious thought as to whether there is any better way to remedy the evils which exist. They have simply followed the lead of Mr. Bacon, an earnest, honest man, who has embarked on a "Peter, the Hermit" crusade, and they have adopted his cure-all for a very complicated disease.

For thirty years I have been a student of the transportation question from a shipper's point of view, and an advocate of reasonable control of railways. I think I may say without egotism that I had more to do with creating a railroad commission, and defining its powers in New York State, than any other man; and with the exception of Hon. John H. Reagan, its father, I had as much to do with creating and defining the powers of the Interstate Commerce Commission.

The CHAIRMAN. Let me interrupt you there a moment. Do you give John H. Reagan the credit of the system that we have now?

Mr. THURBER. Mr. Reagan was the father of the interstate commerce bill.

The CHAIRMAN. This bill that is now a law?

Mr. THURBER. Yes, sir.

The CHAIRMAN. You are entirely mistaken. He was the undeviating opponent of this bill. He had his own bill, an entirely different proposition, instituting an entirely different method of control, and as distinct from this as it is possible to imagine.

Mr. THURBER. Mr. Chairman, I should not expect—

The CHAIRMAN. I was then a member of the House and a member of this committee at the time of the passage of that bill. You will remember—and, if not, let me remind you—that the House committee refused to report Mr. Reagan's bill. It adopted the bill that was then known as the Cullom bill. The House reversed that action and attached the Reagan bill to the Senate bill as an amendment, and in the conference, after Mr. Reagan had become United States Senator, the conference committee, of which he was a member, consented to the report of the House, receding from its amendment, and adopted the Senate bill.

Mr. THURBER. I know that there were several bills pending and that Mr. Reagan was, you might say, the advocate of regulation—

The CHAIRMAN. Of control, yes.

Mr. THURBER. But I cooperated with him very earnestly, I remem-

ber, in prohibiting pooling in that bill, and that afterwards we both concluded that under proper restrictions pooling was desirable, because it was necessary to prevent unjust discriminations.

Both of these laws were founded on a Massachusetts railway commission law, which confers full powers of investigation upon the Commission, with power to appeal to the courts, or to the legislature, to enjoin abuses and fix rates; and in both Massachusetts and New York this has been found sufficient to protect the public interests; better, indeed, than in those States which conferred rate-making powers upon their railroad commissioners. This is illustrated by the following article from the Railroad Gazette of December 30:

#### ARE RATE MAKING COMMISSIONS SUCCESSFUL?

It is an interesting phenomenon, in connection with the agitation for the enlargement of the powers of the Interstate Commerce Commission, that so much effort is expended in the exploitation of the evils alleged to exist, that none is available to show the applicability of the proposed remedies. Without for a moment admitting that the frictional evils incident to the mutual adjustments necessary between a rapidly developing transportation system and an industrial organization, of which the former is a part, which is moving forward with equal speed, are as great as the proponents of the Quarles-Cooper bill contend, it is worth while to ask whether, if they were, the remedy proposed would correct them. Thirty States of the American Union now have railroad commissions, and in 22 instances these commissions have rate making powers.

Would it not be reasonable to investigate the results in these States before adopting similar legislation concerning Interstate Commerce? Such data as are now available indicate that official rate making has not been very satisfactory to those states which have tried it. Georgia, for example, was one of the earliest States to adopt a drastic railroad commission law, and has consistently followed the plan of interposing its authority between the buyers and sellers of railroad transportation. Yet the newspapers of Georgia to-day declare that the shippers of their State pay more than their neighbors in adjoining States, and that interstate traffic, which the Interstate Commerce Commission so loudly complains is not subject to effective regulation, is carried similar distances at much lower rates. A recent editorial in the Atlanta Journal contains the following:

"A merchant in Marietta can ship certain goods to Chattanooga for 15 cents per hundred; to Knoxville for 19 cents per hundred. To ship the same goods to Atlanta he must pay 30 cents per hundred; to Macon 70 cents per hundred. Atlanta is 20 miles from Marietta; Chattanooga is 128 miles, and yet the Chattanooga merchant pays just one-half of the freight the Atlanta merchant does."

Mr. ADAMSON. That argument relates to interstate commerce and not to the Georgia railroad situation.

Mr. THURBER. Well, sir; it speaks of the Georgia railroad situation, and it has a bearing on the interstate rates.

Mr. ADAMSON. There is no trouble about the Georgia railroad commission, you can rest easy on that; the only question is, Has the Federal Government the same right to make such a law as the State has, the State chartering those corporations and the Federal Government not chartering them? The Federal Government derives its power solely from the interstate commerce clause of the Constitution.

Mr. THURBER. Yes, sir.

Mr. ADAMSON. And not from the fact that it is the father of these corporations.

Mr. THURBER. Yes, sir; that is true. I think this article is pertinent to the situation and tends to touch the various sides of this question.

Mr. ADAMSON. You can find newspaper articles pertinent to the general subject that you could read until doomsday.

Mr. THURBER (continuing to read):

"Why? Because Chattanooga is out of the State, and Atlanta is in it. This is merely one of a hundred instances where Georgia points are placed at a positive disadvantage in freight rates because they are located in the State."

The editorial from which the foregoing is an extract shows traces of feeling which suggest the attitude of an advocate rather than one of judicial impartiality—

And then it goes on to discuss it, and it shows that the reason for it is that it is the arm's length situation; that the railroad agent simply refers a shipper to the State commission, and says: "Those are the rates fixed by the State commission, and we have nothing to do with it." It removes the incentive he has to endeavor to meet situations that arise in business.

Mr. ADAMSON. It is plain to any man, and I think to the Atlanta Journal, that rates between Atlanta and Knoxville are not Georgia railroad commission matters at all; they are interstate commerce matters.

Mr. THURBER. The Railroad Gazette goes on to say:

The shipper is told, in effect, that the State will look out for the needs of business in the way of reduced rates of transportation, and he knows that, until driven to plead confiscatory taking of property without due process of law at the bar of justice, the revenues of his corporation will have no defender but himself and his fellow officers. He knows that a justifiable reduction will be made in argument for others that are wholly devoid of justification, and he naturally assumes an attitude of hostility to all reductions. Again, capital is reluctant to engage in railroad enterprises where the rate-making power has been taken from its employees and lodged in political officers, and the States which have the most drastic regulative laws have usually seen the slowest development of railroad facilities, with the natural accompaniment of slow development, the retardation of the natural decline in rates.

From my own knowledge, I can testify that it was not intended to confer rate-making powers upon the Interstate Commerce Commission. This is proven by the following extracts from the debates in Congress when the bill was pending—and I have a quotation here from what Mr. Findlay said on December 8, 1884, and also what Mr. Reagan said, in answer to Mr. Findlay.

Later, on January 7, 1905, Mr. Reagan said:

One of the greatest troubles I have had, even with the friends of legislation in this direction, has been to get them to understand that this is not a bill to regulate freight rates; that it does not undertake to prescribe rates for the transportation of freight. I know the difficulties which would attend any measure attempting to prescribe rates of freight. I am persuaded that no law fixing rates of freight could be made to work with justice either to the railroads or to the public; and I have intended from the beginning to avoid that difficulty.

And in the Senate, May 6, 1886, Mr. Kenna said:

What constitutes a reasonable rate is precisely the thing which the people of this country are unwilling to leave to the arbitrary discretion of the railroad commission.

Judge Cooley, its first chairman, recognized this; but after his retirement the Commission assumed that it had this power, and exercised it until the Supreme Court of the United States decided it had not, since which time the radical element in the Commission has been seeking to get this power, and has invoked the influence of the radical element among shippers to induce Congress to confer it. The state of mind of this element is illustrated by the fact that at the interstate-commerce law meeting held at St. Louis, October 27, 1904, it was stated that the railroads owned the Congress of the United States and no longer ago than December 30, 1904, Mr. Prouty of the Inter

state Commerce Commission, in an interview published in Chicago, is reported to have said that "If the Commission was worth buying, the railroads would own it."

Mr. BACON. May I ask to whom that is attributed—Congress being owned by the railroads of the United States?

Mr. THURBER. Well, Mr. Bacon made a statement there which I had not intended to say he was entirely responsible for, because it was made by others. The attorney for the Texas cattle shippers—what was his name?

Mr. BACON. Mr. Cowan.

Mr. THURBER. Mr. Cowan also made that same statement. I was present and heard it, and the whole trend of the papers and speeches which were made there was so radical that it did not commend itself to my judgment, although I am in favor of the regulation of the railroads.

Mr. BACON. I asked who made the statement that Congress was owned by the railroads.

Mr. THURBER. I think you did, Mr. Bacon, and I think that Mr. Cowan did.

Mr. BACON. I never made such a statement and never had such a thought in my life.

Mr. THURBER. That was the impression I got.

Mr. BACON. And I wish to say the trend of thought in that convention was decidedly conservative and reasonable. The statements that were made were reasonable, and a resolution was adopted that the statements of one man were not indorsed and would not be allowed to go out as the expression of the convention.

Mr. MANN. When I asked you yesterday, quoting from "Freight," whether you made such a statement, you said that you did not remember, as I recall it.

Mr. BACON. I said that on two or three occasions.

Mr. MANN. And now you say you did not make such a statement?

Mr. BACON. I say I have no recollection of such a statement as the one attributed to me. I will say now that if you can prove I made such a statement I will stand by it.

Mr. MANN. I never wanted to prove it; I wanted you to deny it, for your own good name and the good name of the members of Congress, and you refused to deny it when I gave you the opportunity.

Mr. BACON. I stated that I had no recollection of making such a statement.

Mr. MANN. I think you will find the record says that you say you do not remember whether you made the statement or not. You did say afterwards that you never had such a thought.

Mr. BACON. I think there has been enough said about that.

Mr. ADAMSON. You were given the opportunity to deny it for the good sense of yourself and the integrity of yourself and your associates.

Mr. THURBER. I can only say that I went into that convention with a paper which advocated reasonable control of railroads, and after three papers had preceded me which, in my judgment, advocated unreasonable control of railroads, I was cut off by the passage of a resolution limiting debate to two minutes.

Mr. BACON. Let me say, Mr. Chairman, that Mr. Thurber offered his resolution after the committee on resolutions had made its report

and there was no time to consider it. When the meeting of the committee on resolutions was held a motion was passed that no further resolutions would be entertained other than those that had been presented to the committee.

Mr. THURBER. I endeavored to speak to the report of the committee on resolutions but was cut off by the two-minute rule.

Mr. MANN. That is, there were only two minutes allowed to discuss the report of the committee on resolutions?

Mr. THURBER. No person was allowed more than two minutes.

Mr. MANN. I think that I read some report of a speech that certainly took more than two minutes to deliver, discussing the report of the committee on resolutions.

Mr. THURBER. That was before the passage of the rule.

Mr. ADAMSON. Perhaps they were allowed leave to print.

Mr. BACON. I will say that nearly an hour was devoted to the discussion of the report of the committee on resolutions. This was on the second day, past noon on the second day, when there were only two or three hours remaining for action and a large number of delegates were desirous to return home by afternoon or evening trains, and consequently a limit was set to debate; after there had been some considerable debate a limit was set to further discussion on the question, and finally the report was adopted, on the previous question being adopted.

Mr. THURBER. Mr. Prouty, of the Interstate Commerce Commission, in an interview published in Chicago, is reported to have said that "If the Commission was worth buying, the railroads would own it." The reasonable element among shippers does not believe this, but they are less demonstrative than the radical element and do not make themselves heard. Their view is well expressed by resolutions adopted by the New York Board of Trade and Transportation.

Mr. ADAMSON. Are you still reading from a newspaper or is that your own production?

Mr. THURBER. No, sir; I am not reading from the newspaper now. The resolutions referred to are as follows:

*Resolved*, That to invest the Interstate Commerce Commission with power to declare "what rate or rates" are "unjustly discriminative or unreasonable," and "what rates would be just and reasonable," and to further provide that the rates which the Commission deem just and reasonable shall be substituted, is, in our judgment, a long step toward conferring the general rate-making power upon the Commission, if, indeed, the provisions of the Quarles-Cooper bill would not confer precisely that power. The advocates of that bill disavow any intent to confer such power and do not defend the conferring of such power. The Commission has heretofore claimed the rate-making power, and has endeavored to exercise it in various decisions, which has been overruled by the courts. It seems to have been made clear that neither the framers of the act nor Congress intended to confer that power on the Interstate Commerce Commission. The Quarles-Cooper bill confers that power to the extent of pronouncing rates and classifications to be unreasonable and how far they are unjust, or the naming of a rate or practice in substitution. This confers a judicial power upon a constantly changing body, appointed without special reference to that phase of their duties; and while the country has been fortunate thus far in the character of their men placed on the Commission, political and other considerations may have undue weight in the selection of Commissioners, and the Commission would be more likely to be influenced by such considerations than the judiciary. The Commission has full power of investigation and can appeal to the court to enforce its conclusions, and the courts have supported the findings of the Commission by injunction when the prohibition of unjust discriminations was concerned. This is the effective remedy that has been found to exist under the present law.



Mr. ADAMSON. Will you let me ask you a question right there?

Mr. THURBER. Certainly.

Mr. ADAMSON. Do you believe that it is more dangerous to invest the Commission with the rate-making power, so far as the question of possible partisanship is concerned, than to invest that power in railroad men?

Mr. THURBER. I do not know that, sir; but I do think they would be more likely to err than the courts. Our Atlantic-port people are afraid that the Gulf-port people will get the advantage of them, and the Gulf-port people are afraid that the Pacific-coast people will get the advantage. So this question of rates is a very intricate question for the Interstate Commerce Commission to consider.

Mr. ADAMSON. Would not partisanship be the most dangerous factor to be reckoned with in investing the Commission with that power?

Mr. THURBER. I think sectionalism or partisanship would be most dangerous. This country is a country where the great object is to get the products of the country to a market abroad, and I don't think that the power in any narrow way should be lodged anywhere where it might interfere with the Constitution of the United States, which is a safeguard in these great matters.

Mr. TOWNSEND. Would not the Supreme Court look after that, if it interfered with the Constitution?

Mr. THURBER. Yes. That is where our safety lies—in our courts. And if we have not enough courts now to give speedy decisions, then we should have more courts established for that purpose.

I am now reading from the resolutions of the New York Board of Trade and Transportation, adopted by them, and which have been placed on the programme for consideration at the meeting of the National Board of Trade in Washington the coming week [reading]:

We believe, therefore, that the decisions of the Interstate Commerce Commission should be, and can be, enforced when made upon complaint of unjust discrimination; but we are not prepared to commend a measure which gives the Interstate Commerce Commission a power so general. It seems to us wiser, for the present at least, to rely upon the recently applied method of enforcing the decisions of the Commission by injunction than to enact the Quarles-Cooper bill, the provisions of which may be construed to be much more far-reaching than even its advocates are willing to defend or consent to.

*Resolved*, That this Board earnestly advocates legislation by Congress to amend the interstate-commerce law so as to permit pooling by railroads, under the supervision and control of the Interstate Commerce Commission, to the end that unjust discrimination may be prevented and reasonable, uniform, and stable rates be established.

This view is further emphasized by the following resolutions, adopted by the directors of the United States Export Association January 3, 1905:

*Resolved*, That in the opinion of this association the bill now pending in Congress known as the Cooper-Quarles bill, conferring in some degree rate-making powers upon the Interstate Commerce Commission and making its findings operative until reversed by the courts, is a step in the wrong direction; that while the Interstate Commerce Commission performs a useful function in investigating and making recommendations, it should not have powers equivalent to prosecutor, judge, and jury combined; that to make its findings operative until reversed by the courts is like hanging a man and trying him afterwards, for rates are so related that one affects a thousand or a million, and a damage thus done can not be estimated or repaired.

*Resolved*, That this association is opposed to unjust discrimination in any form in the operation of our public highways, but a reasonable elasticity in their operation is necessary in order to market our surplus products abroad, and that to deny this

would operate to the detriment of our producers, manufacturers, laborers, and the general public.

*Resolved*, That the courts are the best judges of what constitutes a "square deal," and if there are not now enough to give prompt decisions, more should be established to that end.

Mr. Chairman and gentlemen of your committee, there are a few great facts that are not generally recognized. Among them are, first, that all combinations and consolidations of transportation lines in this country have resulted in better service and lower rates. This is illustrated by the following figures from the United States Bureau of Statistics. I have the figures here giving the average receipts per ton-mile of leading railroads in 1870, 1880, 1890, and 1902, inclusive. This shows a progressive decline, which it is not necessary for me to give in detail, but the decline in average receipts on these leading railroads in the time given is from 1.99 in 1870 to 0.75 in 1902; that is, per ton-mile.

This result has been attained largely through combinations and consolidations, which, contrary to the impression generally entertained, have not resulted in abolishing competition, but rather in economies of operation and improvement in service, accompanied by a steady reduction of rates, with but few exceptions, which prove the rule. During the past three years rates have slightly advanced, owing to a much greater advance in labor and materials. Railway freight rates in the United States are, however, less than one-half those of other principal countries. Our railroads carry our chief products 1,000 miles to our seaboard for less than the railroads of other countries charge for carrying these products 200 miles inland from the seacoast after they have crossed the ocean. And the railroad rates abroad and in the United States have been graphically illustrated by the Philadelphia museums in a diagram which I have had reproduced, which is attached to this paper.

Mr. RICHARDSON. What is the difference between local rates in this country and in England?

Mr. THURBER. They are about double in England what they are here, sir—our local rates.

Mr. BACON. Do you not know that the rates in England include delivery at both ends—teaming?

Mr. THURBER. They do in some instances.

Mr. RICHARDSON. What is the difference between the profits of the local rates in this country and the through rates—the long haul and the short haul?

Mr. THURBER. As to the profits?

Mr. RICHARDSON. Yes; what is the proportion; what is the difference?

Mr. THURBER. That I don't know; but my impression is—

Mr. RICHARDSON. Is it not five times as great in local rates as in the through rates?

Mr. THURBER. I do not think it is five times as great, but I think it is greater.

Mr. RICHARDSON. Do you not know that it is five times greater?

Mr. THURBER. No; that does not come under my observation.

Mr. LAMAR. Do you know whether the capitalization of railroads is under Government supervision and control in England?

Mr. THURBER. No, sir; I do not know; but they are capitalized much higher in England; the cost of construction in England is much

greater than in the United States, and the land costs them more than here; the damages are much greater in England. The capitalization in England, I think, is more than double what it is in the United States.

Mr. LAMAR. What is the relation of capitalization to cost in England, if you know? I ask for information; I do not know myself.

Mr. THURBER. I think the board of trade, a department of the Government there, has a very general supervision over capitalization, as well as everything else. No railroad can be constructed in England unless it has the approval of the board of trade, and second, get the authority of Parliament.

Mr. RICHARDSON. What is the difference between the classification of this country and England?

Mr. THURBER. The classification of freight? I don't know.

Mr. RICHARDSON. You don't know that?

Mr. THURBER. No, sir.

Mr. RICHARDSON. You do not know how it comes in as to classification in this country and in England?

Mr. THURBER. No, sir; I do not.

Mr. SHACKLEFORD. In England they have a statutory maximum rate, do they not?

Mr. THURBER. No, sir; I think not, unless it is in the charters of the various railroads. I think that that was in the earlier charters, from what I have read and studied, that the earlier charters of the railroads all imposed maximum rates.

Mr. SHACKLEFORD. I think I noticed in Mr. Prouty's testimony before this or some other committee that he stated that Parliament had established maximum rates.

Mr. THURBER. So far as my knowledge extends, the maximum rates were, in the beginning, in the charters of the roads, and they have always been so much higher than those rates obtaining in actual business that had no bearing

To continue along the line I was on——

That this great result has been attained by free and unhampered American railroad men, who have induced investors to put ten thousand million dollars into making this possible. It has merged the fertile furrow of the prairie farm in the closing furrow of the sea, and made myriad acres valuable which otherwise would be valueless. It has made us the leading nation of the world. Are the men who have done this less entitled to reward than those who invested in the land and waited for the unearned increment? It isn't what you have got, but where you have got it, that constitutes value, and this applies alike to fields, forests, mines, and factories.

Every private car line which gives its owners an advantage over the average shipper should be absorbed by the railroads, just as the privately owned fast freight lines were absorbed.

Every terminal railroad which gives its owners a like advantage should be thus absorbed.

If all the railroads in the United States were consolidated into one great system under corporate management, it would be to the public advantage, just as previous consolidations have been. It would not abrogate competition, for the great competition is that of sections, States, and nations. If a manufacturer in one State wants to bid on a contract in another State, where a low commodity rate would get the business and keep his works running, and a railroad has empty cars

going that way, it should be allowed to make a special rate, provided that rate is open to all manufacturers on equal terms. If an exporter can sell a cargo of wheat in Europe in competition with Argentina, if he can get a special rate at a minute's notice, and the railroad can make the deal possible, it should be allowed to do so.

The rate there is a very important consideration. In the great movements in trade to-day the bargains are made largely by telegraph. It requires instant decision. An importer abroad will cable to his correspondent here an offer. Whether that offer can be accepted depends upon the rate of freight. The correspondent in this country will go to the proper railroad man and if that can be decided right off, without any regulations and laws to interfere, it is greatly to the interest of this country. For the last five years my study of this question has been very largely in creating foreign markets abroad, widening the markets for American products. I have seen the absolute necessity for an absolute reciprocity in that business, and I believe that there should be, in whatever legislation may be enacted in regard to the control of rates, some provision which would, so far as our export trade is concerned, give a greater reciprocity so far as our domestic trade is concerned. It is an absolute requisite. All questions of shipping, and the ocean rates, come in. But it is all summed up in the total which enables the trade to be made, and it all has to be made, by telegraph.

Mr. ADAMSON. Do you recommend any legislation at all, or do you hold that it is unnecessary to have any?

Mr. THURBER. I think, so far as the present situation is concerned, that if you will create another court which will enable speedy decisions to be made in all controversies that arise between shippers and carriers, and you will give the railroads the right to make reasonable agreements between themselves, subject to the approval of the Interstate Commerce Commission—

Mr. ADAMSON. You want a pooling clause?

Mr. THURBER. Yes, sir; because that is absolutely necessary to prevent these unjust discriminations. I formerly was in favor of the prohibition of pooling. I did all I could with the commerce of this country to prohibit pooling, because we felt that it was likely to result, if the railroads had that power, in exorbitant rates for transportation; but the experience of twelve years has shown me that there was no danger of unjust rates, and there was great danger of unjust discriminations; and the prevention of pooling, the making of agreements between railroads allowed the unscrupulous element in railroad management to sand bag the honest element in railroad management into making these unjust discriminations, and Mr. Reagan wrote a letter, which was submitted here to Congress, in which he stated that subject to reasonable control by the Interstate Commerce Commission he thought such agreements should be allowed, and he wrote to me to the effect that he agreed with me in my conclusions that the law had operated differently from what he thought it would when it was enacted.

Mr. BACON. I would like to ask one question, whether Mr. Thurber is not aware that when pooling was in operation very extensively in this country it failed to prevent discrimination, from the fact that pooling arrangements were temporary and limited to a certain time, and every railroad was striving to secure the advantage, so that upon

the renewal of pooling arrangements it could acquire a larger percentage of the rate, and therefore the efforts of each railroad were bent to the end of increasing their percentage, so as to make a better arrangement upon the renewal of the pooling contract.

Mr. THURBER. I will say in answer to Mr. Bacon's question that Mr. Albert Fink, one of the ablest railroad men in this country, considered that it was impossible to stop unjust discriminations, or to minimize them, unless the railroads had the right to enforce their agreements upon each other—in other words, the same right that all other corporations or other individuals have.

Mr. BACON. That does not answer my question. What I want you to state is if you do not know that discriminations were actually made under pooling contracts, during their continuance?

Mr. THURBER. I think that it was greatly minimized. I do not think that it was stopped entirely.

The CHAIRMAN. There never has been a time when a pooling contract could be enforced in the courts. They were always contrary to the common law, and never have been enforced by the courts.

Mr. THURBER. I do not know as to being contrary to the common law, but I do know that when the trunk lines were upheld, and Mr. Fink was commissioner, it resulted in fair rates and greater stability than after that commission was pronounced illegal.

The CHAIRMAN. But the enforcement of those contracts was dependent entirely upon the integrity of the parties and not at all upon fear of the operation of the courts.

Mr. THURBER. That is my impression.

Mr. BACON. May I say a word?

The CHAIRMAN. After Mr. Thurber has answered.

Mr. THURBER. Certainly.

Mr. BACON. I want to say that while they were subject to the integrity of the parties they were very largely observed by them, but that whether or not, even though they were legally binding, the same inducement would remain for a poor road getting a larger part of the traffic than its percentage in order to get a higher percentage in the next contract, and I will say that I have had repeated offers of rebates from different roads on traffic that was comprised in the pools years ago.

Mr. THURBER. I see that your time is very short now, Mr. Chairman, and I will abbreviate my remarks. It is this freedom which has reduced our rates in this country to one-half those of other countries, and we should not put our railroads in official clamps which would prevent this.

There is a broad distinction, however, between rate-making and preventing unjust discriminations. We need the Interstate Commerce Commission to police the latter, but it should not be the judge of the former. I think that the rest of what I had to say has been practically covered here.

Mr. ADAMSON. Do you not think that the prevention of discrimination should be the limit of Federal interference?

Mr. THURBER. Yes, sir; I do.

Mr. RICHARDSON. How would you enforce the power to prevent the discrimination?

Mr. THURBER. I would have the Interstate Commerce Commission as a prosecuting body, and I would have the courts as judges of what was just and what was unjust, and what in accordance with the law.

Mr. LAMAR. Are you acquainted with the President's views on this matter?

Mr. THURBER. I can not say that I am.

Mr. LAMAR. You read his message to Congress?

Mr. THURBER. Yes, sir.

Mr. LAMAR. You understand from that that he recommends that the commission shall have the power, not exactly for original rate-making—rate-making in general—but that they may have the power to correct an unjust rate and put the corrected rate in effect at once, subject to the action of the courts?

Mr. THURBER. Yes, sir; I think he has imbibed Mr. Bacon's views.

Mr. LAMAR. Yes. You do not think, then, that he is safe and sound on that?

Mr. THURBER. I think that he is one of the most honest and well-meaning men in the world, but he is just as liable to be mistaken as anybody else, and just as liable to error, because of not knowing about the subject under consideration.

Mr. STEVENS. I think the committee would like to have you and your association identified, and I would like to know if you are the same person and if the United States Export Association is the same body, which received funds from Gen. Leonard Wood when he was governor-general of Cuba, and from Mr. Havemeyer, of the sugar trust, on this so-called reciprocity treaty?

Mr. THURBER. The bureau did receive money for the purpose of endeavoring to get a reciprocity treaty between Cuba and the United States.

Mr. STEVENS. What I wanted to know is whether you are the same person as the Mr. Thurber who was then connected with that?

Mr. THURBER. I am.

Mr. STEVENS. And whether this association is the same association as endeavored to get funds from General Wood and Mr. Havemeyer?

Mr. THURBER. It is; yes, sir.

Mr. BACON. I would like to ask one question, and that is, in view of the fact that you have appeared at several of the commercial conventions in opposition to this legislation—I wish to make this inquiry for the information of the committee—whether you have received, are receiving, or expect to receive compensation from any of the corporations for that service?

Mr. THURBER. No, sir; I do not.

Mr. BACON. That is all.

Mr. TOWNSEND. Is this gentleman going to be here after to-day?

The CHAIRMAN. Do you desire to ask him any questions?

Mr. TOWNSEND. Yes, I want to, very much.

The CHAIRMAN. Mr. Thurber, can you appear before the committee on Friday?

Mr. THURBER. I can if it is desired.

The CHAIRMAN. I wish you would.

Thereupon the committee adjourned until to-morrow, Thursday, at 10.30 o'clock a. m.

Mr. CHAIRMAN. I wish to correct my statement of Wednesday, to which you called my attention, in regard to the matter of stating that the Hon. John H. Reagan was "the father" of the present interstate-commerce bill. Mr. Reagan was perhaps the most prominent advocate of legislation for the regulation of railways at that time, in which I

supported him; but you are correct in stating that he was not the author of the present interstate-commerce law, and I think that both Mr. Reagan and myself at that time were very much in the position of Mr. Bacon at the present time, namely, that we felt something ought to be done, but we were not exactly sure as to how it should be done and to what extent it should be done.

I would ask that the words "its father" be omitted from the first page of my statement submitted to your committee on Wednesday (see copy herewith). I also wish to answer more fully one of the questions which was asked me on Wednesday.

Mr. Stevens, of your committee, just at the close of the hearing asked me whether I was the Thurber who was connected with the agitation for the Cuban reciprocity treaty, and as this may have a bearing on Mr. Stevens's (and possibly others) opinion of my view of the bill now under consideration, I wish to answer his question more fully than is possible by yes or no, viz: The Cuban chambers of commerce sent a committee here to try and get a reciprocity treaty which would admit their products into the United States and our products into Cuba.

They came to me as president of the United States Export Association for advice and help. I told them to put the facts before the American people and I thought they could get it. They didn't know how to do it and hadn't means to do it, yet they were paying to the United States insular government a million and a quarter dollars a month in duties on imports into Cuba, which was being expended for police, sanitation, education, etc. I told them that if they could get an infinitesimal part of this appropriated for publicity, it would help Cuba and help American producers. Through General Wood they got about one-tenth of 1 per cent of a single year's duties, or \$12,500, appropriated for that purpose. Then they couldn't get any more and were short, and I got Mr. Havemeyer to contribute \$2,500 more for this purpose. This money was expended in printing, postage, and clerk hire.

I told the whole story to the Senate Committee on Cuban Affairs, and the beet-sugar interests, which were opposing the treaty, sought to make it appear that something improper had been done.

If it is wrong to try and widen our markets for all American products, I was wrong in doing so. If it was commendable, I am entitled to credit. At any rate, I did what I thought was right for the greatest good of the greatest number, and those who know me will testify that I always do this; and that is my position on the bill under consideration, which I believe in its present form would be against the interest of the producers and shippers of the United States.

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THURSDAY, *January 12, 1907.*

The committee met at 10.30 o'clock a. m., Hon. W. P. Hepburn in the chair.

Mr. DAVEY. I desire to move that the hearings in regard to all the bills relating to the increase of the power of the Interstate Commerce Commission be considered as closed January 23, and that the committee proceed to consider on January 24 the different bills before them.

The CHAIRMAN. That is inopportune now. It would be proper to consider a matter of that kind in executive session. Later on we will take that up.

Mr. Spencer, will you proceed, if you please.

**STATEMENT OF MR. SAMUEL SPENCER, PRESIDENT OF THE SOUTHERN RAILWAY COMPANY.**

Mr. Chairman and gentlemen, before going into the matter before us, I may say that it is not my purpose to discuss the subject in its entirety because it would be impossible within the limit of time that is now before us.

I am here representing, of course, among others, the Southern Railway Company, of which I am the executive; but not that company alone. As may not be known to the members of the committee, during the winter I am resident in Washington, where our chief operating offices are, and, growing out of that fact, several of the other railroads of the United States, with some of which I am connected, have asked me, after consultation, to do what I now propose. Therefore it is not one railroad's representation that I propose to make, nor is it the particular claim of any railroad or group of railroads. I have preferred, so far as I have anything to say to the committee, to put it upon the ground of a broad, open, and, I hope, a fair discussion of the principles involved in the question which the committee is considering.

To the present status we need devote very little attention. The Commission has had eighteen years of service and experience. It is a well-known fact that important results have been accomplished within that time through the law and by the Commission, and I want to emphasize the fact that that condition is recognized by the railway companies. The great, the very great, abuses and irregularities at which the act was originally aimed have largely been eliminated. The rebate, the secret contract, the discriminatory devices of various kinds were the rule instead of the exception in those days. Now the reverse is the case.

The Commission itself bears testimony that rates are substantially maintained. The law has been strengthened from time to time in order to enable the Commission and the courts to proceed more promptly, more efficiently, by more direct methods, to deal with these questions, and there is a large power now lodged in the hands of the Commission for the remedy of those offenses which are regarded as the worst, and which were so prevalent, and which led logically to the numerous complaints which were then made before the Congress or before the public or before the Commission.

I want to say emphatically, for a very large proportion of the railroads of this country—a very much larger proportion than I have any direct right to speak for, but I say it unhesitatingly—that there is no difference of opinion between the railroads, the country, the Congress, and the President on the subject that rebates are wrong; that they must be stopped; that secret and discriminatory devices of all kinds must meet with the same fate, and, to use the President's own expression: "The highways of transportation must be kept open to all upon equal terms." On that basis the railway companies are ready and anxious to aid and cooperate.

I might add, while I would not suggest, and do not think that any



additional legislation is required to strengthen the hands of the Commission in order to proceed against that particular class of abuses, that if such legislation does appear to the country, to your committee, and to Congress to be necessary the railways will certainly stand—and I have no hesitation in saying so—in a position of cooperation and aid toward that end. That particular phase of regulation of railways has already been pronounced by the Commission as fully covered by existing statutes. It becomes a question of the enforcement of the law.

The question before you, however, as I understand it, is not of that character, and I have alluded to it merely to emphasize the views which I have expressed on behalf of the railways, and for a reason which will come later in what I may have to say in connection with the proposition which is before you to give the Commission power to name a rate, after hearing and complaint, which it has been claimed will be a means of stopping rebates and irregularities. That I have no hesitation in denying, and I will treat it further as we go into that branch of the subject.

Now, in a general way, first, is there a necessity for such legislation? Let us review the situation as it has developed for the last eighteen years. Without burdening you with figures or occupying your time with elaborate statements, summed up, that situation is this: About 90 per cent of all the claims or questions of various kinds which have been presented to the Commission during that period have been adjusted without even formal hearings and decisions upon the part of the Commission. That certainly does not indicate either a defiant or a noncooperative position upon the part of the carriers of this country. Of the remaining 10 per cent, scarcely 2 per cent have been the subject of litigation. That is to say, 90 per cent have been disposed of without formal hearings or decisions upon the part of the Commission; 10 per cent have been the subject of formal hearings and decisions upon the part of the Commission, and less than one-fifth out of that 10 per cent—namely, 2 per cent of the total—have been the subject of litigation under the decisions of the Commission growing out of matters covered by the interstate commerce act. That is for the period of eighteen years.

Reducing the suits to figures, there have been within that period but 43 suits out of 194 cases which were decided against the railroads. The railroads acquiesced in four-fifths of those formal decisions, covering only 10 per cent of the total which were made by the Commission.

The litigation was upon 43 cases. Those cases grew out of various questions, but, as we are discussing the question of rates, I may say that out of the 43 which went to litigation 25 related to rates. In 22 out of the 25 the decision of the Commission was reversed by the courts. One case out of the 25 was affirmed absolutely by the courts, and two were partially confirmed and partially reversed.

Now, looking at general results, I ask what condition of affairs does this indicate in respect to the multitudinous rates over this country for eighteen years, with now 210,000 miles of railroad, and at the beginning of that period 135,000 miles of railroad, covering a country from the Atlantic to the Pacific and from the Lakes to the Gulf. Does the fact that a total of 43 cases of litigation have arisen, and that 25 cases have arisen with respect to rates, indicate that there is a necessity for legislation in respect to the regulation of those rates, when 90 per

cent, if you will allow me to repeat, of all the questions that have arisen have been disposed of without even a hearing by the Commission, and four-fifths of those on which they have rendered a decision have not required litigation in the judgment of either the railroads or the Commission, and the remaining one-fifth of 10 per cent, namely 2 per cent of the total complaints, have gone to litigation?

I shall not comment further upon the fact of how successful that litigation was, because it might have various causes. Certainly I do not mean to suggest to this committee any cause which is disrespectful or derogatory to that Commission. The Commission in its personality is certainly entitled to the respect of this country and ourselves. In its legal position as a tribunal of this country it has, and is entitled to the respect, cooperation, and aid of the railway interests in the carrying out of those purposes for which it was appointed, and those purposes were very important and the results have been very large.

I will come now specifically to the bills which are now before you, or, rather, to the bill, because I shall address myself only to one, namely, the Cooper bill, which is before you; and I shall not undertake in this limited time to discuss more than one phase of that, namely, the power which it proposes to confer upon the Commission, after hearing and complaint, and the decision upon its part that an existing rate is unreasonable, to substitute a rate therefor, to put it into effect at a fixed time, and the provision that it shall remain in effect thereafter, subject only, on the one hand, to change by the Commission in future, in the exercise of similar power, or, upon the other hand, of appeal to the United States courts upon the part of the railways, to set that rate aside; the rate, however, remaining in effect pending such appeal to the courts.

Various advantages and reasons have been assigned for the passage of such an act conferring such powers. They are, first, that it would be merely restoring a power which the Commission substantially for ten years has exercised. That has been repeatedly stated, officially and unofficially, directly and indirectly, and probably as often contradicted. Exactly what is meant by the denial I hope to make clearer to you. What is meant, exactly, by the assertion that they did exercise such power, I must confess that I am at a loss to understand. Certainly in the very first report to the Interstate Commerce Commission the chairman of the Commission distinctly stated in words that the Commission had no such power. It was reiterated by Commissioner Schoonmaker, and the citations which have been made as to the specific cases in which they exercised that power, I must be pardoned for saying, do not cover the case. There is abundant proof of record, to which I can refer you (but for the time I shall not do it, simply leaving it with you, if you desire), that it was claimed and asserted, not only by members of the Commission itself, but by lawyers, counsel for the railways, counsel for others, that the law did not give any such power to the Commission. When the question came to be reviewed by the courts, the courts were emphatic in stating that the power was never there. It is possibly useless for me to elaborate that any further. The authorities are there, and they can be given at any moment that you want them.

I come now to what I consider the only possible basis which could be made for the claim that the Commission once, and for ten years,

substantially exercised that power, namely, the cases which it decided during that period which did affect rates and did result in several cases in their being changed as directed by the Commission. I can cite you a case, or numerous cases, since 1897, where precisely the same thing has happened. The exercise of it at that time, or what is called the exercise of it at that time, was simply this: That the Commission took up those cases, investigated them, rendered a decision, and that decision in many cases was acquiesced in. The railroads did not contest the case. There is authority in the utterances of Judge (afterwards Justice) Jackson to the effect that in that respect the Commission occupied the position of a general referee for all the circuit courts of the United States in respect to such cases. Now, we all know, whether lawyers or not, that the decision of a referee frequently decides the case; that is, it is acquiesced in without further litigation. That is the history of those cases in which it has been claimed the Commission exercised the power of making rates.

The record of the last five years will show that there are numerous similar cases. In 1897 the decision was finally reached by the courts which it was claimed cut off a power of the Commission which it previously had. The reason that it arose was that the Commission undertook to name and to put into effect what it regarded as reasonable rates in contradistinction to what it claimed were unreasonable rates as fixed by the carriers, and it reached that famous case, the Maximum rate case, one of such magnitude and such importance that in mere self-preservation the numerous railroads against which it was aimed—for it was not one—had no alternative but to test that question. What the result of that test was we all know. It was not a cutting off from the Commission of any power which it had previously possessed. It was simply invoking the powers of the courts to prevent the exercise of what would have been a very disastrous action upon the part of the Commission under a power which it never possessed.

It has also been claimed—it is difficult to conceive that it is serious—that this power would be a weapon in the hands of the Commission to prevent rebates. This is what I alluded to at the beginning. A very few words should dispose of it. A rate fixed by the Commission can be rebated and evaded as easily as any other. Therefore it would not put a stop to that.

The claim has been made, I believe not officially, that with that power in the hands of the Commission it would act as a deterrent in the matter of secret rebating or other devices for evading the tariff rates. That could scarcely be considered a serious claim. If it should answer as such a weapon, the effect of the use of that weapon would simply be to punish not the guilty party who evaded the rate, because he was already accepting less, but to punish every innocent party that had obeyed the law and not evaded the rate; that is to say, if because there was to be a rebate the Commission might put all rates down to certain figures those who had not put the rates down would be the sufferers, because the party that had put the rate down, as I say, had already been accepting the lower rate, and therefore would suffer no punishment under the use of this particular weapon. Therefore it would be a weapon to punish the innocent and not to punish the guilty. If it is not to be used, it ought not to exist at all for that purpose.

Probably the most important claim in the whole situation is that such a power would enable the Commission to prevent discriminations

between localities. It is needless for me to say to this committee that the matter of adjusting rates between different localities—commercial, manufacturing, mining, and agricultural—is an extremely intricate and difficult question in any section of the country. It has been found exceedingly difficult within the State borders where such questions have arisen. To apply it to the whole United States of course broadens it out enormously. It is a question of deciding between ports, deciding between distributing centers and jobbing centers, between manufacturing centers, between mining centers, between agricultural and forest regions.

It is impossible to say, it is impossible even to estimate the enormous variety of questions that must arise in that connection, and therefore the question presents itself as to what is the best way to deal with it. The rates of this country—the relative rates, I mean, and I am speaking of relative rates alone—have already been adjusted in a certain sense. That adjustment is the result of long experience, long and sometimes bitter competition, not only between the carriers themselves, but between communities, because the carrier is invariably appealed to if one community feels that it can not put its product, whatever it may be, into some distant market which it thinks it ought to reach. It is not alone a question of carriers' rates. It is a question of prices. It is a question of quality of goods. It is a question of every item that enters into the problem as to whether a given article can be marketed at a given place or not. To argue that would be endless. But the result is that it has settled down to a measurable, fixed condition of affairs. It can never be absolutely fixed, because the affairs of commerce fluctuate always to an extent that prevents absolute stability. If absolute stability should exist there would be absolute stagnation in commerce.

Let us see what the result of this question of discriminations between localities has been for eighteen years since the passage of the interstate-commerce act. The facts, as recorded in the Interstate Commerce Commission's reports and the experience of the Commission, are these, and this comes from the Commission. I have stated what all of the litigation was, namely, that there were 43 cases of all kinds of litigation in eighteen years; there were 25 cases of litigation on rates. For the ten years prior to 1901 the Commission sustained 31 cases of discriminations between localities. (See Senate Doc. 319.) I use the ten years prior to 1900 because they happen to have been grouped by the Commission itself. This shows only an average of 3 cases per annum, and of these 31 cases only 1 case of discrimination between localities was sustained by the courts.

Now, admitting—and that is all I propose to argue before you gentlemen—admitting that the adjustment of rates between localities involving over 200,000 miles of railroad and 45 States is intricate, enormous—so enormous as to be scarcely within the range of contemplation of any statement that could be made about it—if that is the case, does the result of 31 cases going into court in ten years indicate that there is a necessity for giving to another authority than that which now has it the power to name the rates between those localities?

There is a feature of that which is the Commission's affair, of course, and not ours, but the Commission would be overwhelmed with applications for relief from discrimination. I think the town or the district or the section in this country of any importance which

does not feel in some form or other that it is discriminated against is very rare.

The adjustment between those localities is made by competition between railroads, some of which reach one locality and some another, and a decision is obliged to be reached from a commercial standpoint. It might be entirely different if all of these communities, or all these centers of industry of whatever character, were reached by all the railroads. It would then be entirely a different question. But the adjustment, such as it is, that now exists grows out of the fact of the earnest purpose of a railroad which reaches a given point to see that that point is protected and its products distributed against another point which it does not reach and into the markets of which it wants to put its products. That is the adjustment of competition, and it is not competition alone of the carriers, as I have already stated. It is the competition of commercial communities as well, and to undertake to adjust that solely with reference to the carriers will be to cover only one portion of that very complex and important subject.

The next point that has been made is that this legislation is necessary to prevent the making and the continuance of unreasonable rates, or rates unreasonable and unjust within themselves. Going back for a moment to the result of the experience of the Interstate Commerce Commission in its own decisions, and what has transpired where its decisions have been appealed to the courts for eighteen years, there has not been one single case of unjust and unreasonable rates—unjust and unreasonable per se—sustained by the courts of this country; not a single one. The chairman of the Interstate Commerce Commission himself has borne testimony to the fact that unjust and unreasonable rates per se have become obsolete; that they do not exist. Of course, I mean do not exist substantially; I am not denying that they are possible. But if they are possible, they are condemned by the existing law. They were condemned by the common law before the existing law was passed. Since the passage of the law in 1887 the power of the Commission has been materially increased by amendments to it. Finally, by the Elkins Act of 1903, they have been given what might be called almost summary powers, as complete and prompt and drastic as it is possible to give in respect to any offense against the law in any country where trial must precede conviction.

If there are unjust and unreasonable rates in existence, the remedy is at hand. We have seen that of the cases which have gone to the courts not one single charge of unjust and unreasonable rates per se has been sustained. Now I ask, gentlemen, if it is fair to the railroad interests, under those conditions, that the irreparable injury shall be inflicted upon the railroads of having that rate take effect on the findings of the Commission? If there had been numerous cases where rates had been adjudged unjust and unreasonable, and they had been found to be so, and the penalty of reducing them had been inflicted after long delays, and therefore an injustice had been done to others, the case might wear a very different aspect. But precisely the opposite is true. On trial they have not been sustained; and from that I think it is perfectly fair to argue and to answer that the necessity does not exist for taking out of the hands (even after hearing a complaint) of the railroad companies the making of those rates which, to a very large extent—not entirely, of course—are the subject of competition between carriers and competition between communities.

In this connection in your committee room several weeks ago I heard in person the statement made that this reason for the passage of this act was a potent one, namely, because rates were unreasonable, they were being raised extortionately; and as alleged proof of that the figures given in Senate Document No. 257 were placed before you, the figures being these, that the average rates per ton per mile on all the railroads in the United States for the year ending June 30, 1903, were thirty-nine thousandths of 1 cent per ton per mile higher than they were in 1899, four years previous. There is no denying that fact as stated in the Interstate Commerce Commission's report. It is probably proper to state, though, in passing, that the resolution which called for that information from the Interstate Commerce Commission requested a statement of the rates and of the effect on gross receipts and net of the railroads. The answer—

Mr. MANN. I think you said thirty-nine thousandths?

Mr. SPENCER. Thirty-nine thousandths.

Mr. MANN. It should be thirty-three thousandths, if you will pardon me.

Mr. SPENCER. I beg pardon, then; I am mistaken. I had that impression. I am speaking from memory, and my notes had it thirty-nine thousandths.

Mr. MANN. Well, I have a memorandum taken from the report of the Commission itself.

Mr. SPENCER. I beg pardon. I am very much obliged. That even makes it less. But at all events it does figure out \$155,000,000—

Mr. MANN. That is right, on my basis.

Mr. SPENCER. Yes, sir; I accept the correction with pleasure.

The fact is that the net results for that year were relatively smaller. It is well known that during that period there was almost a constant rise in the cost of material and labor in this country, so that the net results to the railroad companies were less in 1903 than in 1899; and it is an easy calculation to make that the railway companies paid out more to haul a ton of freight 1 mile the last-mentioned year than they did in the first-named year, and that the money that they got would not go as far in purchasing power as the dollar of 1899. But apart from that, we all know that the fluctuation of rates per ton per mile has, taking the average, gone steadily down. It happens in this particular resolution, whether by chance or otherwise I shall not undertake to say, that the lowest average rate for any year in the history of this country was taken, namely, 1899. From the formation of the Interstate Commerce Commission, or going back of that, if you please, until 1899, that rate went down steadily, and in the annual report of that very year—1903—the Interstate Commerce Commission took occasion itself to say that if, in meeting commercial depression, the railway rates were put down during such a period, it was nothing but fair that on a return of prosperity they should go up.

The CHAIRMAN. Mr. Spencer, the hour has arrived when, under the rules of the House, this committee must adjourn. Will you continue your remarks in the morning? I think we have another order for to-morrow, but we have time enough to let you conclude.

Mr. SPENCER. At your pleasure, sir.

Mr. DAVEY. May I ask for an executive session to-morrow for the purpose of considering the motion which I offered?

The CHAIRMAN. Very well. The committee will be in recess until to-morrow morning at 10.30 o'clock.

(Thereupon, at 11.55 o'clock a. m., the committee adjourned until to-morrow, January 13, 1905, at 10.30 o'clock a. m.)

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THURSDAY, *January 13, 1905.*

The committee met at 10.30 o'clock a. m., Hon. W. P. Hepburn in the chair.

**STATEMENT OF SAMUEL SPENCER, ESQ., PRESIDENT OF THE SOUTHERN RAILWAY COMPANY—Continued.**

The CHAIRMAN. Proceed, Mr. Spencer.

Mr. SPENCER. Mr. Chairman and gentlemen: At the point of interruption yesterday I was in the midst of the discussion of that statement or argument which had been presented to the committee in respect to the increase of approximately \$155,000,000 in 1903 as compared with what the revenue would have been on the same tonnage at the average rates which applied in 1899, the statement that that increase had taken place having been used as an argument that rates were rising in this country and were becoming unjust, unreasonable, and extortionate. Mr. Mann will pardon my repetition, because this has a particular bearing upon the difference of rates between 1899 and 1903, upon which difference the computations were made in respect to the tonnage of 1903 in order to produce the \$155,000,000.

I think Mr. Mann, on examining the question, will find that the average rate between those two years was thirty-nine thousandths of 1 per cent instead of thirty-three thousandths of 1 per cent. I should be delighted to accept the difference, or the correction made by Mr. Mann, because it would add force to what I have to say.

Mr. MANN. I understand—

Mr. SPENCER. But I think Mr. Mann was using the figures of 1899 and 1902, and I was using the figures of 1899 and 1903. Am I right?

Mr. MANN. Well, Mr. Spencer, it is very easy to get at what the exact figures were. The figures as I got them from the Interstate Commerce Report for 1899 were .724 of 1 per cent.

Mr. SPENCER. Yes, sir.

Mr. MANN. And the figures for 1903 were .757 of 1 per cent.

Mr. SPENCER. Well, I made those of 1902 as 0.757, and it is 0.763 for 1903, according to the reports themselves. I went back to the reports and not to Document 257. I went back to the Annual Report of the Commission.

Mr. MANN. I took the statement of the Interstate Commerce Commission, and unless I am mistaken—which might easily be—

Mr. SPENCER. It really is not material, except that if I should accept the figures as now suggested by Mr. Mann the increase would be less than the \$155,000,000, and I think we must stand on the point that the—

Mr. MANN. It does not affect the principle, of course.

Mr. SPENCER. It will not affect the principle in the slightest.

Now, as I said at closing, the year of the lowest average rate in the history of the country was in 1899 and that year was selected as the

basis of comparison. In the annual report of 1903 of the Commission this language was used, not having reference to the point that is before us, but to an entirely different question: That if rates are reduced during periods of commercial depression, it would be reasonable that they should be increased on the return of industrial activity. That may not be an exact quotation, but it is substantially so. I find I have it here. "When reductions have been made on account of commercial depression, it is difficult to see why corresponding advances may not be properly made with the return of business prosperity," is the wording.

Now, if that be true, and there can be no doubt about it, to reach fair conclusions in respect to that small increase of thirty-nine thousandths of 1 cent for the carrying of 1 ton of freight 1 mile it would certainly be fair to go back and look at what the average was. When the interstate-commerce law took effect the rate was over 1 cent. In 1903, the year on which this argument was made, it was 0.763. There is a reduction of over 25 per cent within the period since the interstate-commerce law was passed. If the railroads are to be judged—and they ought not to be; I am not saying that at all—adversely because during one particular period, from 1899 to 1903, the rate rose gradually; if that is to be argued as representing an extortionate raising of rates, the reduction from 1887 down to 1899, twelve years, from over 1 cent to 7.24 mills, ought to be put as a balance upon the other side of the account.

The fact is, however, that the increase which took place from 1899 to 1903 did not, as it would appear from the surface of the report and upon the statement and arguments which have been based upon it, indicate a raising of rates in this country at all. The average rate per ton per mile is always fluctuating. It is true that the average of all the fluctuations has been down continually except for short periods, but it is fluctuating more or less all the time. It would show a fluctuation from now until next July, and from next July until next December. If the rates were absolutely rigid and fixed and unalterable by any conditions whatever, there are other large and important elements entering into the question of how an average rate results than the mere point of what each individual tariff upon each individual article may be.

I have pointed out yesterday that even if there had been a raise of rates, that the dollar which the railroad company got for that business, for that particular year, 1903, would have purchased less in the way of its necessities in labor and material than it would have purchased in 1899, upon the same tonnage; and all this increase of that \$155,000,000 is based upon the theoretical view of the same tonnage. The \$155,000,000 is made up assuming that the tonnage of the two years was the same, and applying the average rate.

MR. TOWNSEND. Which year do you assume the tonnage to be in?

MR. SPENCER. Nineteen hundred and three was the year for which the tonnage was taken, the larger tonnage of the two. If there is an argument made upon the two, of course they took the larger tonnage. On the same basis the operating expenses increased per ton, or per unit of traffic, whichever you may call it, in a very much larger proportion than the rate per ton per mile increased.

Now, what were the causes which were operative? Various explanations have been made. The manifest one to look at first is the difference in the classes of tonnage. The statement has been erroneously made,



from what source I do not know at the moment, but I have seen it in print, and I am not sure that it has not been presented to this committee, that the amount of low-class tonnage, which takes low rates, increases more rapidly than the amount of high-class tonnage. Now, sometimes that happens and sometimes it does not. Of course if rates remain fixed and you get a larger proportion of low-class tonnage and a smaller proportion of high-class tonnage the average rate per ton of the total result will go down. Conversely, if a larger proportion of high-class tonnage is shipped and a smaller proportion of low-class tonnage the rate goes up.

There were two things that happened in 1899 and immediately thereafter which bore in a very important way upon that question. One was the movement of Government stores to the Spanish war. A great many of them moved at low rates. Under the land grants they all moved at reduced rates. They all moved, practically, at special rates made for the occasion. The year 1899 happened to be marked as the period of the lowest rates in the history of this country; by far the lowest, in the movement of what is probably the very largest single tonnage, and that is bituminous coal. After that the rates on bituminous coal became more normal. They were certainly abnormally low in 1899. That would have affected it.

Apart from that—I have not seen anyone state this fact, and the statistics bear it out—you will recall the period of depression which preceded by a couple of years 1899. That depression was very great, as you all remember, in 1896. The recovery in 1897, after the inauguration of Mr. McKinley, was slower than had been anticipated. It came in 1898, and the fiscal year 1899 reflected some of the results of that depression, although the revival of trade had been begun at that time.

It is a well-known fact, and it is easily susceptible of proof, if you want to burden yourselves with statistics, that when a period of activity begins in this country it begins in one of two ways, or both; and in that particular case it began in both. It begins with the movement of large crops of agricultural products, the great bulk of which move at low rates—extremely low rates—per ton per mile. Our export grain business is done at an exceedingly low rate, far below the average—scarcely more than half of the average for the total tonnage of the United States. It begins with the activity of the iron mills and the furnaces. Of course, therefore, the coal mine and the iron-ore mine and the coke oven all provide low-class freights. Therefore, the movement at the beginning of a period of prosperity is at a less average rate per ton per mile than if everything were in normal condition.

Now, then, you follow that along for three or four years, as the prosperity of this country developed from 1899 to 1903, marking the very highest period of activity and wealth and wealth production in the history of the country, and what is the result? The result of the movement of the large crops and their sale, the result of the operation of the blast furnace, and the rolling mill, and the coal mine, and the coke oven, is that money is diffused from one end of this country to the other. That is the time when people have money—the people at large—and during that period they had more of it than at any time in our history. That is when the high-class freights, the merchandise, the dry goods, the luxuries of all kinds begin to move, and move in larger numbers. Taking the total tonnage of the country—the agri-

cultural products in 1899 were 11 per cent of the total; in 1903 they were 9.56 of the total. The products of animals were 3.12 of the total of 1899, and they were down to 2.63 in 1903. The products of mines were 51.47 in the one case, in 1899, and 51.56 in the other, in 1903. The manufactures were up—

Mr. ADAMSON. Are you speaking of tonnage or rates?

Mr. SPENCER. Tonnage—tons of movement—combating the statement that although the average rate per ton per mile went up it was in the face of the alleged fact that low classes grow more rapidly in movement than the high classes.

Now, we have seen how those low classes dropped, the product of the mines standing practically still. The products of the forest went up slightly, and the product of the forest is at a high rate—from 10.89 to 11.67. We now come to manufactures, of which I spoke. It was 13.45 per cent in 1899 and it was 14.39 in 1903. The merchandise went from 4.49 up to 4.69. Miscellaneous commodities, which include the articles unclassified, the kinds not shown in the other classes, advanced from 5.25 in 1899 to 5.50 in 1903.

The fact is therefore true that the high-class freights increased more rapidly in amount than the low-class freights, and therefore there would have been an increase in the average rate per ton per mile if tariffs had stayed exactly where they were.

I have gone very much more into that than I intended, and I will just call attention to one more thing, as to whether that was a large increase, under the circumstances. The difference, as I have stated, was thirty-nine thousandths of 1 per cent per ton per mile. And it is spoken of as representing an enormous increase in rates and charges by the carriers in this country. In the year 1902 the Interstate Commerce Commission in its report, commenting upon the difference in rate per ton per mile—exactly the same subject—between the years 1897 and 1902, referred to the fact that that difference was forty-one thousandths of 1 per cent (you will observe that it was thirty-nine thousandths in the other case), and that was coupled with the statement that, in their words, “broadly speaking, the rates were about the same.” Now, if a difference of forty-one thousandths of 1 per cent is “about the same” in commenting upon this subject in 1902, it seems scarcely reasonable to characterize a difference of thirty-nine thousandths in 1903 as “enormously” increasing the rates in this country. It illustrates merely the point of view.

Mr. MANN. What was the first year you named there?

Mr. SPENCER. 1897 as compared with 1902.

Mr. MANN. Have you made any calculation as to how much more the total freight bill would have been in 1903 if the freight rate per ton per mile in 1897 had been in force in 1903?

Mr. SPENCER. The freight rate? That difference is \$155,000,000. That is precisely the calculation which has been made, if I understand Mr. Mann's question.

Mr. MANN. No; the position that has been taken is that if the freight rate of 1899 per ton per mile had been in force in 1903, freight collected would have been \$155,000,000 less than actually was the case. Now, have you made any calculation as to how much more would have been collected if the freight rate per ton per mile of 1897 had been in force in 1903?

Mr. SPENCER. I have not made it, but you can make it approxi-

mately in a moment. The rate in 1897 was 0.798 and in 1903 it was 0.763. There are thirty-five thousandths upon the same tonnage as thirty-nine thousandths. It would have been about 11 per cent off of \$155,000,000.

Mr. RICHARDSON. Was there not a gradual decrease of railroad freights from the close of the civil war down to 1900?

Mr. SPENCER. At the close of the civil war I have not the figures. I have the figures back as far as 1870.

Mr. RICHARDSON. What was the cause of the sudden increase or raise of the charges from 1900?

Mr. SPENCER. It has not been sudden.

Mr. RICHARDSON. That is what I asked. Has it been sudden?

Mr. SPENCER. No.

The CHAIRMAN. He has been discussing that prior to your coming in at length.

Mr. RICHARDSON. I did not know it.

Mr. ADAMSON. I understand your idea to be that if in 1897 as high a character of goods had been shipped, they would have been charged in a higher classification, and the difference would not have been as much as \$155,000,000?

Mr. SPENCER. No; it would not. If the character of the tonnage had been precisely the same in the two years there would have been no such difference as \$155,000,000.

Mr. ADAMSON. The difference in charges would have been greater, because the goods would have been in a higher classification, and there would have been no change in the classification?

Mr. SPENCER. Well, that is true; and, if you will pardon me, the fact is in this case that there was more of the higher class.

Mr. ADAMSON. Of course—

Mr. SPENCER. And if you are going to make the comparison not only of the same rate per ton per mile, but of the same character of tonnage for the two years, the \$155,000,000 would not have worked out.

Mr. ADAMSON. Then if you apply the rates in 1897 to the character of tonnage in 1902, the difference would not be so great?

Mr. SPENCER. No. I say it would not, although I have not looked at it, because the relative amount of high-class tonnage was rising during the whole of that time after 1896.

Mr. TOWNSEND. Have not the railroads changed their classification, changing from the lower to the higher, during that time?

Mr. SPENCER. Sometimes, yes. On any wholesale basis, no. But there are fluctuations going on in classifications as there are in rates, all the time.

Mr. TOWNSEND. Can you state how much that change has been?

Mr. SPENCER. I could not. It would require a very intricate analysis for the whole country. No one railroad would have it, you know. We would have to go to the Interstate Commerce Commission to get it.

Mr. TOWNSEND. To make your argument complete, we ought to know that, ought we not?

Mr. SPENCER. Well, I think not; because we are necessarily dealing with it upon general principles. You could analyze it down to any point that you please, but I think the point is clear, irrespective of that, that the gradual rise in the average rate per ton per mile on all the tonnage of the whole country to the extent of thirty-nine thou-

sandths of one cent per ton per mile is not significant of any elevation of rates in this country, and that is the only point to which I am addressing myself—as to whether there is any indication that rates are being raised or becoming extortionate in this country.

Mr. ADAMSON. In changing classifications, do you ever lower the classification of any article in common use?

Mr. SPENCER. Frequently; in fact, the great majority of changes are in that direction.

Mr. RICHARDSON. What principle governs you in making your classification? Is it the articles or goods that are related to each other?

Mr. SPENCER. They are related to each other.

Mr. RICHARDSON. And when you establish a classification and put a rate upon it that embraces all of the articles or goods of that nature and kind?

Mr. SPENCER. Of that nature and kind.

Mr. RICHARDSON. And that are dependent upon each other?

Mr. SPENCER. Well, dependent upon each other or for any reason for convenience classed together. I do not know that I could give a better illustration of this very complicated subject than this, it has grown up so gradually. Originally it was simply a means of obviating the necessity of naming rates upon every commodity by getting together a class and saying that that particular class shall take a certain rate.

I do not know that I can give any better illustration of it than to say that when goods come through the custom-house they are classed. That is for convenience, because commodity rates upon all the commodities, everything that appears in the United States, would be endless, and it is a mere matter of convenience. Now, experience has demonstrated that a classification did not wholly answer the purpose; and therefore articles have been taken out of what are known as classes A, B, C, D, or 1, 2, 3, 4, and 5, and put in with commodities. Coal, for instance, got to moving in such large quantities that it was a class of itself. Pig iron moves in a class of its own. Cotton moves in a class of its own. Wheat and corn all move irrespective of the numbered classes.

Mr. ADAMSON. Just for information, if you will excuse me. When you make a classification that way, say in the third class or the fourth class, that is not the same classification throughout the whole country; it only applies to the particular railroads in a certain province or territory?

Mr. SPENCER. It is limited to certain railroads that have agreed to adopt that classification. That is all. It may be one or it may be a dozen.

Mr. ADAMSON. And the same articles or the same goods in any other section of the country may be classed entirely differently?

Mr. SPENCER. Yes, sir.

Mr. ADAMSON. And then, when you fix the class, for instance, in the territory in which your railroad or the others have agreed to a certain tariff, it only applies to that territory and none other?

Mr. SPENCER. Yes, sir; that is, the bill of lading is issued under that particular classification.

Mr. SHACKLEFORD. In that connection, would there be any objection, by either the shipper or the carrier, if there should be a tight and fast uniform classification for the country?

Mr. SPENCER. Theoretically I should say not, if it could be done; but what would happen would be this—and that has been the great obstacle in the way of doing it so far—that the classification, of course, fixes the rate unless you alter the tariff at the same time.

Mr. LOVERING. May I ask you——

The CHAIRMAN. I would like to have Mr. Spencer complete his answer first.

Mr. SPENCER. Yes, sir, The difficulties which have arisen are that the A road classifies a certain article in a certain class, say in California, and B road in New England classifies it in a different way, both of those classifications having grown up as a matter of practice in that particular region, and the rates having become settled upon that. Now, the rates on those two classifications may be entirely different or they may be the same. Such a coincidence might occur. But if you undertake to make it uniform, each road is going to say and each region is going to say: "Well, if I am to adopt that it throws my rates out of line. I have either got to lower certain rates to do it or I have got to raise certain rates to do it, and that will work harm or injustice."

Mr. SHACKLEFORD. It would not be any inconvenience to adjust the rates to a general and uniform classification?

Mr. SPENCER. It would be a great convenience, if it could be done.

Mr. SHACKLEFORD. Well, would it be an impossible task to adjust the rates to a uniform classification?

Mr. SPENCER. I could not answer that question as to whether it would be impossible or not. In the end, I do not suppose, in these matters, that anything is impossible; but to do it violently and suddenly would be impossible without a commercial upheaval of some kind. You would have a distorted condition of affairs.

Mr. ADAMSON. Do not different commodities predominate in different sections of the country?

Mr. SPENCER. Yes, sir.

Mr. ADAMSON. For instance, in California and Massachusetts oranges would be more important at one end and codfish at the other? (Laughter.)

Mr. SPENCER. Precisely.

Mr. ADAMSON. That is an exaggerated statement, of course, but it expresses my idea.

Mr. SPENCER. The classifications originally upon each road were made up with reference to that road. There was a time in this country when each railroad was a little territory within itself. It did not exchange business all over the United States as is done to-day. These classifications grew up from that primitive condition. They were not made primarily or originally to fit the present conditions. What has been done by a gradual process of evolution is that, as circumstances arose, certain commodities would become important in certain communities, and classifications would be made covering large territories and areas which would be adopted by roads similarly situated carrying similar products. That process of evolution is still going on, but it has by no means covered the entire United States, and except at the expense of commercial disturbance must be a gradual process. It is growing every day.

Mr. ADAMSON. I was only going to say that I think I can show you language of the Supreme Court in which they say that uniformity is absolutely impossible in the United States in commerce.

Mr. SPENCER. It is. And when all the business of this country moves at uniform fixed rates this country is through growing.

Mr. LOVERING. I would like to ask: Take, for instance, dry goods; manufactures are in one class, and the rate is made, say, from Boston to Atlanta at one rate for that class. Is it the same on the return from Atlanta to Boston as it is from Boston to Atlanta?

Mr. SPENCER. I can not answer that specifically with reference to those two points.

Mr. LOVERING. Is it not very much larger?

Mr. SPENCER. I can not answer it specifically.

Mr. LOVERING. Is it not very much larger?

Mr. SPENCER. The classification is very frequently different in the two directions, and I think as a rule it is different. In the trunk-line territory it certainly is the case.

Mr. LOVERING. Take it in the matter of dry goods; does it not cost a great deal more to ship dry goods from Boston to Atlanta than from Atlanta to Massachusetts?

Mr. MANN. It can not be possible that they ship any dry goods from Atlanta to Boston?

Mr. LOVERING. They do, sir; a great deal.

Mr. SPENCER. You will probably recall the fact, Mr. Lovering, that in the annual report of the Interstate Commerce Commission for last year it was stated that there were 165,000 tariffs filed in that one year with them by the railroads. You will therefore pardon my not knowing about the particular rates embraced in your inquiry.

Mr. SHERMAN. Mr. Spencer has stated the general principle, that the freight rate is frequently much larger in one direction than it is in the other.

Mr. SPENCER. Yes, sir; and that may be the rate itself, or by difference of classification.

Mr. SHACKLEFORD. Is that due to the fact that railroads are liable to have more demand for cars in one direction than in the opposite direction?

Mr. SPENCER. That is always the case. There is always an excess in one direction. Moreover, this is true, and you must not lose sight of that, because it is a prime factor in this situation, that out of New England and the Eastern States, from the importing ports, the movement of merchandise is very much larger inward than the movement of merchandise is from the interior to the coast, because our merchandise and manufactures are as yet in the eastern portion of this country, and the eastern portion of the country also does the importing. The interior of the country is a manufacturing territory of lower class goods than dry goods and things of that kind; that is, the highly finished products, and it is still predominantly an agricultural region. Now, the tariffs and the classifications are made east bound with reference to the convenient grouping of the particular products which prevail in that direction, going back to the point that the classification is a mere convenient grouping of the stuff that does move. If one class of stuff moves west, a classification is made with reference to that particular kind of movement.

Mr. LOVERING. Does that depend on the volume of it?

Mr. SPENCER. No; it depends upon the character and volume both.

As I say, a classification started as a mere matter of convenience to obviate having a thousand and one commodities to deal with, the idea

being to classify them as you classify imports at the custom-house. I am consuming a great deal of your time.

Mr. RICHARDSON. I understood you to say at the beginning of your statement that you were entirely in favor of a law prohibiting rebates?

Mr. SPENCER. Yes, sir; absolutely. . You can not make it any too tight for me.

Mr. RICHARDSON. It can not be made too drastic to suit you, so far as you speak for your own company?

Mr. SPENCER. Yes; and I think I can unauthoritatively speak for more than 75 per cent of the railroads of this country.

Mr. RICHARDSON. Is the practice of rebates going on among railroads now?

Mr. SPENCER. No; not to any appreciable extent. It is practically a criminal act to-day. For me to say "no" absolutely would be like my saying, probably, that robbery is not going on in the United States to-day. I suppose it is, but I do not know it.

Mr. RICHARDSON. You do not know it?

Mr. SPENCER. I only mean to say this, that it is decidedly the exception. It is not countenanced by any honest, well-managed railroad in this country, and 95 per cent of all the railroads in this country would put their face against it just as emphatically as you would.

Mr. RICHARDSON. And the law to-day prohibits it?

Mr. SPENCER. Absolutely prohibits it, and it provides summary methods for the punishment of it.

Mr. RICHARDSON. Then no additional law that we might make here—

Mr. SPENCER. I expressed the opinion yesterday that I do not think any additional legislation is necessary for that purpose.

Mr. MANN. Before you go further, may I ask you a question about this \$155,000,000?

Mr. SPENCER. Certainly.

Mr. MANN. As I understand, the claim that \$155,000,000 more was collected for freight in 1903 than would have been collected at the rates in 1899 is arrived at by multiplying the total mile tonnage by the rate per mile tonnage, 0.724, of 1899?

Mr. SPENCER. Yes, sir; and 0.763 of 1903.

Mr. MANN. And that gives an increase of \$155,000,000 in freight. Now, then, would the converse also be true if that is the correct method of arriving at it? In 1896 it is claimed that the Interstate Commerce Commission had the power to say what was a reasonable rate, and it must be assumed that if they exercised that power the rates then in existence were reasonable; and in 1896 the rate—

Mr. SPENCER. It did not make a single one of them.

Mr. MANN (continuing). In 1896 the rate per ton per mile was 0.806 of a cent, or forty-three thousandths higher than it was in 1903?

Mr. SPENCER. Yes, sir.

Mr. MANN. Now, if the proposition is true that \$155,000,000 more was collected in 1903 than should have been collected on the rate in 1899, is it not true conversely that if the rate of 1896 had been in effect in 1903 there would have been nearly \$200,000,000 more collected than were in fact collected?

Mr. SPENCER. Yes, sir—well, I should not make it \$200,000,000.

Mr. MANN. Well, it is not quite \$200,000,000.

Mr. SPENCER. But it would have been considerably larger.

Mr. MANN. It would have been over \$160,000,000!

Mr. SPENCER. Yes; considerably over.

Mr. MANN. Now, is there such a difference in fact in the freight rates?

Mr. SPENCER. No, sir; I do not believe there was. It would involve an examination of every waybill that was made during that year to finally answer that question; but you can group the information and arrive at it very closely and approximately.

Mr. MANN. Was there such a reduction in the general average of freight rates between 1896, when the Interstate Commerce Commission claimed it had authority to fix rates, and 1903, when it admitted, by the Supreme Court decision, that it did not have authority? Was there such a reduction during that period of time as would make a difference of more than \$160,000,000 in freight?

Mr. SPENCER. No, sir; I do not think there was that difference in the tariffs. I think the difference was partially made up, just as I have stated about the \$155,000,000. I must say, in all fairness, that it was partially made up in the difference in the character of the movements, and not entirely in the rates. These rates which had been in effect were not changed to that extent. I have no hesitation in asserting that the average changes of rates wherever changes took place were reductions instead of increases. There may have been a few increases, but the great majority were decreases and always are.

The CHAIRMAN. Proceed, Mr. Spencer.

Mr. TOWNSEND. Did you assent to the proposition or statement of Mr. Mann that the Interstate Commerce Commission had the power, really, under the act, to declare what was a reasonable rate?

Mr. MANN. I said "claimed to have" the power.

Mr. SPENCER. No, sir; he said "claimed to have it." No, sir; I must distinctly disclaim that. I do not think that that power ever existed.

Mr. TOWNSEND. That they can not ever declare what is an unreasonable rate?

Mr. SPENCER. Yes; undoubtedly the law gives them that power.

Mr. TOWNSEND. That is the question I asked you.

Mr. RICHARDSON. Do you recall any instance for ten years after the existence of the act where they did exercise the authority of fixing a rate after they had declared a rate to be unreasonable?

Mr. SPENCER. They did not do that any more than they are doing it now.

Mr. TOWNSEND. That is not my question. I did not ask if you thought they had the power to fix rates, but if you now believe that the Interstate Commerce Commission has the right to declare what is an unreasonable rate?

Mr. SPENCER. Yes, sir; they have the right to make the declaration. We have also the right to dispute it in the courts. I am coming to that in a few minutes, if I am not consuming too much of the time of the committee. The question of the determination of what is a reasonable or an unreasonable rate is purely a judicial function under our law.

Mr. TOWNSEND. Has that question ever been passed upon directly by the the Supreme Court, saying that this Interstate Commerce Commission has the right to declare what is an unreasonable rate?

Mr. SPENCER. I do not recall the language of the court on that sub



ject. They have done that in many cases, and in two cases, as I recited yesterday, where there were questions of discriminations between localities they were sustained by the courts in it. They can declare a rate unlawful, and the law is that their declaration on that subject, with the evidence before them, is *prima facie* evidence when the question goes to the court. I would rather you would ask that question of a lawyer. I am not a lawyer.

Mr. CUSHMAN. As I understand your position, Mr. Spencer, it is that the Interstate Commerce Commission have the power to declare any given rate unreasonable, but they have not the additional power to declare and enforce what is a reasonable rate?

Mr. SPENCER. What they regard as a reasonable rate.

Mr. CUSHMAN. What they regard as a reasonable rate?

Mr. SPENCER. That is it, sir.

Mr. LAMAR. Do you think that power attempted to be conferred by Congress would be a constitutional power? Did you say that a while ago?

Mr. SPENCER. I am not a constitutional lawyer.

Mr. LAMAR. I understood you to say that. I was not quite sure.

Mr. SPENCER. No.

Mr. SHACKLEFORD. He said he was not a lawyer.

Mr. SPENCER. I did not state as to whether the law would be constitutional or not. I would not undertake to do that.

Mr. LAMAR. I thought you did say a few moments ago.

Mr. SPENCER. I might have a layman's view of it; but I could not speak as a lawyer.

Mr. LAMAR. I misapprehended a remark of yours; that is all.

Mr. SPENCER. Now, I shall have to run hurriedly over a few points and endeavor to show you that that particular power of substituting what they regard as a reasonable rate in the place of one which they regarded as unreasonable and to be condemned was not necessary either to protect the reasonableness of rates of this country or the relative rates between localities; was not necessary to give them power to enforce tariffs or to prevent rebates. Against the granting of such a power to that particular body I want to give some reason, and if you will pardon my saying it again it is that particular power that I refer to, not legislation on railroad questions. That I am not discussing at the moment, but only that particular power which would be prejudicial in many respects. In the first place, it would necessarily diminish the activity of competition between localities.

In another connection, which I touched upon yesterday, and upon which I shall say very little now, that activity of competition is largely made up, as I stated, of the desire of a railroad which does not reach a certain territory to put the products which are manufactured in its territory into the market against those which are manufactured in the territory which it does not reach. That produces a constant competition all the time, and not only that, but they have the active support of the merchants and manufacturers along the line of their road to put their products in the market. Now, if that power is to be taken from the railroads who are engaged in that contest with the shippers and the manufacturers and the merchants and the jobbers along their lines, necessarily their efforts will be to a greater or less extent neutralized. They would necessarily wait, if they were applied to to put down a rate as a means of developing additional business; they would

necessarily say: "Well, if I put that in, that is regarded as a reasonable rate. The very fact that I put it in is almost a conclusive argument—it is conclusive against me—that it is a reasonable rate that I am willing to submit to if the business pays me."

The moment the right to make rates is given to a governmental body there is a power other than the other railroad, and the power of a mind from a certain distance to put the corresponding rate right in against it. Therefore they will wait. And that is what happens to-day in the States where they have commissions exercising any power to make rates. The initiation of rates upon the part of the railroads is—I will not say entirely, because that would not be wholly true—but it is partially true that the railroads stop initiating new rates in those territories.

Mr. SHACKLEFORD. Right at that point, which it seems to me is a crucial point in this whole controversy: As between those two communities, would the Commission have the power to raise a rate from one point rather than lower the rate from the other in order to preserve the equilibrium which they would seek to preserve by the regulation of rates? Take a case which I submitted to a witness the other day: Supposing that Eau Claire and La Crosse, Wis., are competing points for a general central market; that the rate from Eau Claire is supposed by the Commission to be reasonable and still Eau Claire can not successfully compete with La Crosse, would the Commission in such a case as that be authorized under this law to raise the rate from La Crosse to Chicago rather than to lower the rate from Eau Claire to Chicago?

Mr. SPENCER. Is that the question?

Mr. SHACKLEFORD. Yes, sir; that is the question, whether that would be a power granted by this bill, and whether it would be a wise one to exercise.

Mr. SPENCER. I must say, in the first place, that I have not read the bill with reference to that particular question, as to any power that might be conferred to raise a rate. I confess, in all frankness, that that aspect of it had not occurred to me as a practical question. If they have the right under the act, and I am answering without accurate knowledge of the wording at the moment, to name a reasonable rate in the place of one that they adjudged to be unreasonable, I should say that legally and technically it would carry with it the power to set the low rate up instead of putting the high rate down.

Mr. TOWNSEND. But the Interstate Commerce Commission has always ruled that that was a bill solely in the interests of the people, have they not?

Mr. SPENCER. I have so understood it; and I have not thought that purpose was as suggested by Mr. Shackleford, for the reason, I suppose, that I never read it with that view.

Mr. TOWNSEND. I agree with you on that.

Mr. SHACKLEFORD. Have not the Commissioners themselves said that they wanted the power to do that very thing that I have suggested, as between the two very towns that I have cited?

Mr. TOWNSEND. I do not know that. I only knew that the rulings of the Commission have been, as I understand it, heretofore, along the line that they are exclusively for the people, and that is why I do not like it.

Mr. SHACKLEFORD. But there will be other commissioners that will

follow them. It is not a question as to what has been the practice, but what will the law authorize.

Mr. SPENCER. If I may interject there, I may say that I think any power given to any tribunal to name the maximum rate for the railways, the carriers of the United States, or to carry with it the right to name a maximum, would have no equity in it.

Mr. MANN. I call your attention to the specific proposition that is in the Cooper-Quarles Act. It is not the power to fix a maximum rate at all.

Mr. SPENCER. No; it is not.

Mr. MANN. It is the power to fix a particular rate.

Mr. SPENCER. That was my recollection, as I stated it from memory. I thought it would convey it.

Mr. ESCH. Would not that carry with it the power to raise as well as to lower?

Mr. SPENCER. I should think so. But I repeat I did not read it with that view, because in all frankness I must say I do not think that would arise as a practical question under it.

Mr. SHACKLEFORD. And in giving this power to fix rates it also gives the power to raise rates as well as to lower rates. Would not the ultimate tendency of it be to raise the rates on water transportation where they make it impossible for railroads to live in competition with water transportation?

Mr. SPENCER. At present the law does not apply to water transportation.

Mr. SHACKLEFORD. The Commission is seeking to have it do so.

Mr. SPENCER. I should say interstate commerce transportation by water ought to be covered, but you will find some of it that could not be covered.

Again, while undertaking to protect the shipper, under this bill there is no provision for the protection of the carrier at all. The Interstate Commerce Commission has stated in one of its reports that the rates in this country were in many cases too low. Now, if that be true, ought not a bill which undertakes to regulate against rates that are too high make some practical provision for regulating against rates that are unreasonably and improperly low? It may be said, doubtless will be—that has been the practice, at all events—that that is a subject on which the carriers would be expected to take care of themselves; and, of course, the burden of it must fall upon them. They can not call to their aid with any justice or fairness the arm of the Government to support their tariffs and their management. In the first place they would not receive it, and in the next place it would be impractical. I do not think that protection in the way of their raising a rate in order to equalize and regulate would be feasible. I do not think it would be successful in practice, and the only form that it can be given which I could suggest would be that the carriers should be relieved of the disability which they are now under of not being able to make reasonable agreements among themselves. The fact is that in order to maintain the rates as provided for in the interstate commerce law such agreements must be made. It can not be otherwise. Rates to be uniform and stable, as is intended by the law, to be public under all the circumstances, must be made with one carrier knowing what the other is doing with precisely the same traffic at the same time.

The interpretation which has been placed upon the antitrust law is

that they can not make an agreement among themselves in respect to traffic of any kind, whether reasonable or unreasonable. And I merely submit for your consideration in that connection that if any legislation is to take place in any form—I hope it will not be in this particular form, if it does—that it should include something that will insure that sort of stability of rates upon the one hand which is required by the law and upon the other that reasonable protection of the carriers in making charges that are at least reasonably high, in order to remunerate them for the service which they perform.

If you will look through the Interstate Commerce Commission's report, you will see three or four or five utterances to the effect that the rates are in many cases in this country entirely too low. The phrase is expressed in one case that the service can be performed at some of the rates that pertain upon the railroads.

If there is to be legislation, I merely throw out that suggestion that the carriers be relieved of that entirely anomalous prohibition which is put upon them of making reasonable agreement among themselves. They ought not to be entitled to make unreasonable ones. They ought not to be entitled to make any, possibly, that are not subject to public scrutiny.

Mr. RICHARDSON. Is not that "pooling," what you mean?

Mr. SPENCER. Oh, no. You can extend it until it is pooling, but it is not necessarily pooling.

Mr. SHACKLEFORD. It is a joint contract for through rates?

Mr. SPENCER. A joint contract for through rates. They are in existence all around. You put out a rate from Atlanta or from New York to-day for the several carriers, and despite the law that I have referred to, it is necessarily the case that these carriers have got to exchange their views. You can say they make no agreement, but they do exchange views, and issue the same rate on the same day. Nothing can stop it, you know.

Mr. ADAMSON. Would the advantage to the carriers from this opportunity to make an agreement be that they could recoup in other places for their losses where they are compelled to maintain these low rates, abnormally low, as you say?

Mr. SPENCER. Well, I do not think so, to any extent. I think it would have to be reasonable in itself. That is, if I understand your question, if they were taking a very unreasonable rate here, which they could not get out of in any way—

Mr. ADAMSON. I take it for granted that wherever these rates are abnormally low, as you said, it is for some reason of necessity, where you find that you have it to do?

Mr. SPENCER. Yes, sir.

Mr. ADAMSON. And therefore you think that if you had authority to make these agreements you could, in the general adjustment of the agreement, recoup those losses elsewhere?

Mr. SPENCER. No, sir. My idea was that the causes which lead to that unreasonable rate there might be removed with reference to that rate if a reasonable agreement could be made. I would propose for that authority—and I think I stated it accurately—

Mr. ADAMSON. Then you could raise those rates?

Mr. SPENCER. We could then raise that rate. The remedy is to allow the railroads to make a reasonable agreement for the maintenance of reasonable rates. If we found that we could not touch the

particular rate at all, and we wanted to recoup, as you suggest, by making it up somewhere else, with the law in the form I suggested, we would have to submit to some public authority that agreement which we proposed as a reasonable one. So that we could not establish an unreasonably high rate here in order to recoup for an unreasonably low one elsewhere.

Mr. RICHARDSON. To whom would you submit that agreement for supervision?

Mr. SPENCER. To the Interstate Commerce Commission.

Mr. RICHARDSON. Would you give them authority to say that it is unjust or unfair?

Mr. SPENCER. If it was not just we could not do it.

Mr. RICHARDSON. And if it is unjust, they would have the power to designate what the contract should be?

Mr. SPENCER. No. I would not suggest that they make the contracts between us.

Mr. RICHARDSON. But simply to pass on your contracts?

Mr. SPENCER. To have the power to annul it, or that it can not go into effect without their consent. That is better still.

Mr. RICHARDSON. I just wanted to understand that.

Mr. SPENCER. Again, the granting of that authority to name a rate, under the circumstances described in this bill, would inflict an irreparable injury upon the carrier in a case where the matter was appealed to the courts. The rate having already taken effect, if the courts should decide that the original rate of the railway company was reasonable and just, there would be no possible means for the railway company to recoup that loss. Now, the process is that the Interstate Commerce Commission has the power, and it is one of its duties, that having found what it regards to be an unreasonable rate, either by its own motion or after hearing, it shall condemn that rate. We have seen that in the great majority of cases, something over 90 per cent, where they have done that thing, the railway companies have acquiesced, and stated: "All right; we accept your judgment." But where it has gone into court, the Commission has not established one single case of an unreasonable rate per se, and they have only established two cases of discriminatory rates as between localities, that being less than 10 per cent of the total of the cases which have gone to the courts. If that is the case, is it not fair to the railroad companies that before a rate, on a record like that, is put into effect, the courts should pass upon it, if the railroad company is going to suffer irreparable loss if they finally gain the case?

Mr. ADAMSON. Right there, take the converse of that contingency: Say that they declare a rate to be reasonable and just, and you carry it up, and after years of litigation the courts hold that the adjudication of the Interstate Commerce Commission was correct, and that the rate they declared was the proper one, and allowed it to stand; is not the loss of the shipper irreparable?

Mr. SPENCER. Yes, sir; and that point harks right back to the one question: If I have been guilty of a crime, at what date after judgment should my punishment begin?

Now, you can cover that, if there is any doubt about it, and the court feels that it is a very doubtful case on presentation by letting the court require bond.

Mr. TOWNSEND. That could all be obviated by injunction, anyway, could it not?

Mr. SPENCER. No; the only thing subject to injunction under the Elkins Act, as I understand it, is a departure from established tariff rates, which are a violation of law. It is not a question of enjoining a rate which has not been adjudged unreasonable.

Mr. TOWNSEND. I mean during the time. If the railroad took an appeal in the case, they can enjoin during that proceeding?

Mr. SPENCER. Oh, yes. Now you have a case in point at once. The Interstate Commerce Commission has under consideration the lumber rates from the Southern States, Georgia, Alabama, and Mississippi particularly, to points north of the Ohio River, attacked as unreasonable. That case is now pending in court.

Mr. LOVERING. How long has it been pending?

Mr. SPENCER. It is in the form of a bill for an injunction now. The bond—that is what I was coming to—the bond has been given by the railroad companies to refund to shippers if the case goes against them.

Mr. LOVERING. How long is it likely to continue, if the case is not pressed?

Mr. SPENCER. Well, the Commission is holding the case, so our counsel tells me. The details I have not in mind.

Mr. RICHARDSON. I understood you to say that in the event of the power being given the Commission to fix a rate, after the rate had been investigated and found to be unreasonable and unjust, if the law should give the Commission authority to fix the rate, and if the question should go up to the Supreme Court, the railroad would sustain irreparable damage if the Commission had made a mistake. Now, do you not think that there would be a very strong likelihood of decreasing the probability of those damages if, after the Commission had authority to fix the rate, and the appeal was taken by the railway company to the Federal circuit court, where the appeal had been taken, either party, the railroad or the complainant, should be given the right to summon witnesses and bring them up there and test the question as to whether the Interstate Commerce Commission had fixed a fair and just rate? Would it not lessen the probability of your damages and throw a strong safeguard around the interests of the railroad and the public?

Mr. SPENCER. I do not see how.

Mr. RICHARDSON. You do not see how it would?

Mr. SPENCER. I do not think it would.

Mr. RICHARDSON. Would you not have a second trial on it? Would you not have a second opportunity in the presence of a Federal judge—

Mr. SPENCER. Yes; but if the rate is running all the time, the loss is going on, and there is no way we can get it back.

Mr. RICHARDSON. Suppose authority was given to the court to suspend the rate until that investigation took place?

Mr. SPENCER. That is all I am asking.

Mr. RICHARDSON. And then, after the investigation took place, and the circuit judge, under the evidence that was given, after this Commission had fixed the rate, concluded that it was a reasonable rate, and then the rate went into effect, and you took an appeal to the Supreme Court on the same question, would not that lessen the probability of your damage, because it would not run so long—or the shippers' damage, either?

Mr. SPENCER. If I understand you, Judge, your suggestion is simply to expedite the litigation, whatever it may be?

Mr. RICHARDSON. That is right.

Mr. SPENCER. We are willing to have it expedited. If, under due process of law, the thing can be decided in twenty-four hours, we would rather have it decided in twenty-four hours than to have it decided in forty-eight hours. But, in the meantime, we do not want that rate, which we have regarded as just and reasonable and which we put in for what we regarded as good business reasons, set aside; because that involves the punishment for a wrong thing before you have been adjudged by a competent tribunal to have done a wrong thing.

Mr. RICHARDSON. I was glad to hear you say that if there was to be any legislation upon that subject you would like to give your views—

Mr. SPENCER. That is all I am here presenting. Do not understand, gentlemen, that I am opposing all legislation with respect to the regulation of commerce. I am here arguing to the best of my ability why this particular legislation would not be effective on the one hand, and would be prejudicial against the interests of one important industry in this country, the carriers, on the other.

If, in the wisdom of Congress and of this country, legislation is necessary; all that the railway companies, so far as I have anything to say for them, ask is that this legislation shall be mature, carefully thought out, and shall protect both interests as well as one. I have no right to ask beyond that, and I do not intend to do so. I am merely trying to point out wherein this particular legislation would be harmful to us and not be effective in the direction in which it is aimed.

Mr. ADAMSON. You have no objection, if the law does not already provide for it, to an arrangement to prevent discrimination and secure the speedy termination of litigation?

Mr. SPENCER. Not the slightest. Not the slightest.

Mr. MANN. When you speak of discrimination, what do you mean by that, in answer to Mr. Adamson's question?

Mr. SPENCER. Well, I mean discrimination that really discriminates. I mean unjust and unreasonable and "undue"—I believe the letter of the statute is "undue"—discrimination.

Mr. ADAMSON. "Giving an undue advantage to one person or locality over another" is part of it.

Mr. SPENCER. The man does not live, and the body of men does not live, that can frame any law, or adopt any policy in the management of the carriers of this country, whether owned as they are now, or owned by the Government, or owned by any power—nothing exists that will do away with the alleged discriminations between localities. You can get rid of the discriminations between individuals. It is almost done away with. If it exists it is a crime and can be reached by law. I do not want for a moment, however, to be understood as indicating that we will agree to the adoption of something as a means, or cooperate in putting something into effect as a means, that is going to quiet the question of whether one community is discriminated against in comparison with another. I do not know, as I said to you yesterday, any community of any size that does not feel in some way that it is discriminated against in favor of some other community engaged in similar enterprises or business. That is going to continue, and if a law like this passes, it will grow a thousandfold.

Mr. ADAMSON. If some railroad touches two towns of equal size and importance, equally distant from a distributing center, and in one of

those towns that railroad meets competition and gives a low rate to people who already have a railroad and do not need it, and at the other town it is two or three times as much, is not that discrimination?

Mr. SPENCER. I am not sure of it. I do not think I understand—

Mr. ADAMSON. The towns being of the same size and the distance from the distributing center being the same, one of the towns needing help and the other not needing help?

Mr. SPENCER. I do not know what you mean by one of the towns needing help and the other not. I never saw one that did not need help, or did not think it needed it. All you can ever do from the carrier's standpoint is to adopt something that is commercially reasonable. It may not be equal. You can not measure it as to distance or locality. You can not measure it by reason of a particular position, because no two positions are alike. You must settle—

Mr. ADAMSON. But I made two alike.

The CHAIRMAN. I wish that the interruptions would not occur so frequently when the witness is in the midst of an interesting statement.

Mr. ADAMSON. Well, I understood that Mr. Spencer was willing to answer questions.

Mr. SPENCER. Gentlemen, I am perfectly willing to answer any questions. The one point with me is that I do not want to consume too much time of the committee. I am at your disposal.

Mr. ADAMSON. I am perfectly willing to wait until you are through and then ask my question.

Mr. SPENCER. If it takes a week I am perfectly willing to stay here and answer all questions. I simply wish to avoid occupying too much time of the committee.

Mr. ADAMSON. When you are through with your statement I will ask you what I wish to know.

Mr. SPENCER. I will hurry through with it. There is not very much more of it.

Mr. ADAMSON. I think that is better myself.

Mr. SPENCER. As I have said, the bill inflicts the irreparable injury in the loss of revenue which is going on while the case is pending. That is not the only part of that irreparable injury. You may run into this difficulty: We will assume that the Commission has put a rate into effect and a railroad company has appealed it to the courts. Now, that very fact that the rate goes into effect is a material deterrent, irrespective of the reasonableness or unreasonableness of the rate itself. One of the greatest difficulties we have to deal with—and that is the reason that our unreasonably low rates exist, to a very large extent, because something has occurred—it may be one thing or it may be another; it may be fierce competition; it may be an abortive effort to create new business that did not work out—for various reasons these low rates have gone into effect; and one of the most serious difficulties we have to deal with in practice is to ever get them back. It is not only that people are loath to pay an increased rate above what they have paid. That is natural. None of us like to pay more for a thing than we paid yesterday or the day before yesterday or last year, if we can help it. Beyond that, however, and apart from any individual or personal reluctance in paying more, the rate having gone into effect, the commerce of that particular article, its distribution, the commerce of that particular community, becomes settled around that rate.

Not only have you got the question, then, by the time it goes out of



the courts, to deal with as to whether that rate was a reasonable or an unreasonable one, but you have got the additional question then of expediency to deal with, in view of the altered situation. It may have been perfectly agreeable to everybody almost, except, probably, one complainant, to pay that. They have been convinced by that time that the experiment, if you may so call it, of putting in that rate did not bring in expected results; that it is a disappointment, and yet the very fact that it is there, that the commerce of that section of the country is being carried on in respect to that condition of affairs as thus changed, will be a material reason why that rate could not be put up again; and there is an irreparable loss on a rate which the courts, I am assuming, would finally adjudge (as it has in most of the cases that have come up) was not an unreasonable rate. And yet somebody whose judgment was brought to bear upon it, other than the carrier that controlled that rate, has put it down, and the sum total of the result is that the carrier permanently loses that much revenue, when the commerce of the country would have gone on just as smoothly, just as successfully, to the same volume that it did before.

Lastly, with respect to the objection that it would be conferring anomalous powers upon one body. I might elaborate that at length, but in view of the limited time I shall say very little about it, leaving it, probably for able counsel to follow me hereafter.

The Interstate Commerce Commission, under the present law, is an investigating and a prosecuting body, with administrative powers as well. They entertain claims that are presented to them. They have the power, and it is their duty, in certain cases, to institute proceedings against the carriers with reference to their rates or their practices, or their management in general.

Now, it is proposed to confer by this bill the right for the Commission, upon hearing and complaint—and not upon their own initiative, I quite recognize that—to hear and determine whether a rate is reasonable or unreasonable. That step taken alone is in the nature of a court. That is a judicial function beyond a doubt. It has been decided so by the Supreme Court. There is no question about it, that a determination primarily of what is a reasonable or an unreasonable rate is a judicial function. Now, the Interstate Commerce Commission in that sense is not a court. It has never been so constituted. Its trials are not conducted in accordance with the established rules of evidence of the United States courts, and yet it is suggested in that bill that it shall have the specific right to do what only a court can do—declare a rate unreasonable *per se*.

Now, if that is the case, they are exercising there a judicial function.

Let us take the next step in what would be their procedure in that case. Having taken that judicial action and condemned a rate as unreasonable and unjust, as if they were a court, their next step is, under such authority as is now proposed, to place in existence under its order a new rate—a rate which shall govern for the future. They were dealing up to that point with a rate which related to the past or the present. Now it is proposed that they substitute for that rate, which they have condemned as unreasonable, a rate for the future. To what department of the Government does that belong? That is distinctly, under the law, under the decisions of the courts, a legislative function. The power to name a future rate, so far as it is invested in government, is purely a legislative function.

Now, you are going to have this position. You have got, under the existing law, and it is proposed in this bill to change it, a body which is a prosecuting body. It has been described by Justice Jackson, as I said to you a day or two ago, as follows:

The functions of the Commission are those of referees, or special commissioners, appointed to make preliminary investigation and report upon matters for subsequent judicial examination and determination. In respect to interstate-commerce matters covered by the law, the Commission may be regarded as the general referee of each and every circuit court of the United States upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the act.

You have, therefore, got a prosecuting body exercising administrative functions, as they do to-day, whose findings are *prima facie* evidence when the cases go to court. It is proposed to invest them, in the next step, with a purely judicial function of condemning and setting aside a rate because in their judgment it is unreasonable; and when that judgment is pronounced they can not possibly have sat with all the powers and functions of a court, and under all the practices of a court, and a rate ought not to be condemned until that has been done. Yet it is proposed that this Commission condemn it and set it aside. Then it is proposed that, having set it aside as a judge, they shall immediately assume the functions of a legislature and say what shall take place for the future.

I submit to the committee whether, if there is to be legislation upon this question—and I am not saying that there is not to be and ought not to be; I am passing the question for a moment and will come back to it—if that is the case, is it not worth while to stop now and consider whether the particular legislation which is now proposed is safe, is proper, is such that will stand and be effective, and so far as the carriers' interest is concerned. What is possibly equally as important, is it fair to the carriers' interest?

I am sure that Congress will not enact, I am sure that this committee will not recommend, a thing which, after mature reflection, is regarded as unfair to one of the very great, if not the very greatest, industrial interest in this country. All we have the right to ask, and all I ask in behalf of those that I represent, is that the subject shall be given a very thorough and careful consideration before action is taken.

Let us see exactly what the bearings of all this are going to be. Pause to consider its alleged necessity upon the one part, and upon the other if it is not necessary; its expediency upon the third, and then the promise of success whenever it is enacted.

I have occupied a great deal of your time and I must still apologize. There is only one point more, and I will pass it before I make you a suggestion.

It has been claimed—and I am sorry I have not time to elaborate that—that the granting of this power is not the granting of the total rate-making power. It is a big subject, and I will call your attention to only one case, the maximum-rate case, in which it was decided against the Commission that they did not have the power to make rates. That case involved 2,000 rates in one decision. It means not only that upon complaint they have the right to take up any one rate or set of rates. It means, sooner or later, that not only will they have the power to do it, but the greatest misfortune of all would be that the making of them all would be practically forced upon them. They could not escape it.

Now, I am going to very briefly make a few suggestions.

(1) Form an interstate-commerce court, or so increase the number of judges of the existing court that a special interstate-commerce court can be formed from their number, which shall have special jurisdiction over all cases arising under the interstate-commerce act and its amendments; this court to pass upon all rates adjudged by the Commission on complaint and hearing to be unreasonable before the rate shall take effect there being no appeal from the decision of this court to the Supreme Court, except upon questions of law, and no stay during such appeal.

(2) Bring the private-car lines, fast-freight lines, and the water lines doing a through interstate traffic within the jurisdiction of the interstate-commerce act.

(3) Relieve the carriers of the existing prohibitions against making reasonable agreements among themselves for the purpose of maintaining lawful rates, the agreements and the rates to be subject to the previous approval of the Interstate Commerce Commission.

(4) Enforce the existing laws, not only as a matter of administration of law and justice, but as the most effective means of eliminating the number of complaints.

I want to reiterate that we are not here asking that there shall be no legislation. If in the wisdom of Congress it is thought proper, I suggest that it should take this line: Form an interstate commerce court, or probably better still, give special functions to special sittings of the circuit courts of the United States. Give to the Commission the right to name the rate or suggest the rate, subject to appeal to the courts. That will leave the question where it is if the railroads acquiesce, and they have acquiesced in nearly 90 per cent of all the cases. Now, if they do not acquiesce and take it to the courts, let the rate remain in effect, and the railroad company give bond until the court—I mean the circuit court alone, this interstate commerce court, either a special court or made up from judges of the other circuit courts sitting here or anywhere else—decides that the rates shall go into effect. Then it goes into effect, and there is no suspension after that in appealing to the Supreme Court on questions of law. Begin at the circuit court, stop the appeal at the circuit court, except in cases of law going to the Supreme Court, and that appeal on a law point to the Supreme Court not to stay the proceedings.

Mr. ESCH. Suppose you have a separate court?

Mr. SPENCER. Give it exactly the same power with the right of an appeal on questions of law to the Supreme Court without stay of proceedings.

Bring the necessary water lines engaged in interstate commerce which are competitive with rail carriers—the fast-freight lines, the private-car lines—all of them within the purview of the interstate-commerce law. All of those three which I now mention are exempt.

Relieve the carriers, as I have already suggested, of the anomalous prohibition now against them that they must maintain uniform rates, and at the same time be prohibited from forming any agreement as to what those rates shall be; and give them the authority, under the supervision of the Interstate Commerce Commission, to make reasonable traffic arrangements among themselves, those traffic arrangements to be in writing, to be submitted to the Interstate Commerce Commission before they take effect, and if approved by the Interstate Commerce

Commission to go into effect, and unless they are found to be reasonable and proper, to give the power to the Interstate Commerce Commission to annul them at any time.

Lastly, which is nine-tenths of the whole subject, do anything that will strengthen the hands of the Commission at any time to do away with abuses and rebates.

Mr. TOWNSEND. Without appeal?

Mr. SPENCER. In a word, enforce the present law, and do anything that may be necessary to promote that enforcement.

Gentlemen, I am very much obliged to you for your courteous attention.

Thereupon, at 12 o'clock m., the committee adjourned until Monday, January 16 1905, at 10.30 o'clock a. m.

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MONDAY, *January 16, 1905.*

The committee met at 10.30 o'clock a. m., Hon William P. Hepburn in the chair.

**STATEMENT OF HON. W. R. HEARST, MEMBER OF CONGRESS  
FROM NEW YORK.**

The CHAIRMAN. The committee will be in order. This hour was set for hearing Mr. Hearst. Under this order, Mr. Hearst, the committee is considering all of the bills amendatory of the interstate-commerce law, and is hearing upon all of them together, and so there will be no impropriety in your discussing any of these bills pending before the committee if you so choose.

Mr. HEARST. Yes, sir. I think that I will confine myself, Mr. Chairman, to my own bill, except where the committee desires my views on another.

The CHAIRMAN. Very well.

Mr. HEARST. I wish to say that I do not appear before this committee at all as a lawyer or as an expert railroad man, but merely as a business man who has had some experience before the Interstate Commerce Commission, and of course as a legislator with a bill to correct some of the difficulties and delays and the lack of effectiveness that I encountered while I was before the Commission. I had the coal trust cases before the Commission. They were instituted in the fall of 1902, and it has been something over two years since then, and we have not finished our procedure before the Commission yet. Then we encountered other delays.

The CHAIRMAN. Will it interrupt you if you are interrogated as you pass along, or would you prefer to conclude your remarks first?

Mr. HEARST. Not at all. Anything that suits the committee is agreeable to me.

The CHAIRMAN. You speak of this long delay before the Commission. What is the cause of that delay?

Mr. HEARST. The cause of the delay was the number of points that can be appealed, and the delay in the appeals, and the number of

courts to which the appeals have to go. For instance, the defendants questioned my right to bring the complaint. They said that I was not a shipper. I was, in fact, merely bringing the complaint as a citizen of New York who was subjected to very high coal tariff, to very high prices for coal. That point was appealed. Then the defendants declined to produce certain books and papers—contracts—which were essential and important in the case, and they refused to answer questions, and those points were appealed.

The CHAIRMAN. Were these appeals taken separately or in one appeal?

Mr. HEARST. I think they were taken in one appeal.

The CHAIRMAN. Yes.

Mr. HEARST. First before the circuit court, Judge Lacombe, of the southern circuit of New York, and he decided in favor of the defendant and against the Commission, and then it was appealed to the Supreme Court, and the Supreme Court upheld the Commission in every point, but, nevertheless, those appeals took altogether about a year's time.

The CHAIRMAN. How much time was consumed in the hearings before the Commission?

Mr. HEARST. I suppose the rest of the time was consumed in the hearings.

The CHAIRMAN. How long was it?

Mr. HEARST. About another year.

The CHAIRMAN. How long was it after the institution of your proceeding before the Commission put the thing in such shape that it might be appealed?

Mr. HEARST. The appeals were taken, I think, after hearings had been going on for several months. I would not say how long, exactly. The total time has been from November, 1902, down to this date, and the final arguments, I believe, are to be made before the Commission on February 7; that is, next month.

Mr. RICHARDSON. There was as much time consumed in the delay before the Interstate Commission as there was in the appeals before the higher courts?

Mr. HEARST. Just about, I should say; yes, sir. They were about equal, I think.

Mr. KYLE. Both of you appealing; both parties appealing the case?

Mr. HEARST. In the first case the defendant appealed and in the second case the Interstate Commerce Commission appealed to the Supreme Court.

Mr. KYLE. Then there were two separate appeals, each of you having appealed from some decision?

Mr. HEARST. Yes, sir. The Interstate Commerce Commission ruled and then appealed from the decision of the circuit court which was wrong. They appealed to the Supreme Court, and the books and papers were produced.

Mr. RICHARDSON. Did I understand you as having made any special complaint about the matter of delay, either before the Interstate Commerce Commission or before the appellate court?

Mr. HEARST. No, I have not made any complaint about that. In my bill I have tried to provide clauses that would remedy that.

Mr. RICHARDSON. By establishing precedents?

Mr. HEARST. No, sir; by establishing this Interstate Commerce Court; by establishing a court that will have a power of review.

Mr. RICHARDSON. I see.

Mr. HEARST. The coal cases were instituted originally to show that the high price of coal was due originally to the pooling of the railroads, the establishment of a monopoly, and a combination in restraint of trade, and we succeeded in bringing out before the Interstate Commerce Commission those facts, that the railroads interested, the New Jersey Central and the Reading—the Reading owns the New Jersey Central—those two roads own about 60 per cent of the unmined anthracite coal, and with the other coal roads owned altogether something over 90 per cent, and that they had adopted various measures to crush out competition. For instance, the Temple Iron Company contracts were one of the things that were refused to be produced, and when they were produced they showed that the independent operators, after the establishment of these high rates, had finally gotten together and decided to build a competing line, and that they got rights of way, and bought the steel rails, and at that time, when they began to be threatening, the coal roads stepped in and bought this Temple Iron Company, which had a liberal Pennsylvania charter entitling them to do almost everything, paying for it about \$240,000.

Then they have issued stock and bonds amounting to about \$15,000,000, and guaranteed interest on the stock, and the payment of interest and principal on the bonds, and with this stock and these bonds they bought up eleven of the collieries which were in this combination, in this plan to build a competing road. These collieries belonged to Simpson and Watkins, and that broke the back of this competition. The railroads did not do it by lowering the rates, but they did it in the way I have described. Now, the point is that the stock and bonds of this Temple Iron Company were guaranteed by the six coal roads, and the presidents of the six coal roads are the directors of the Temple Iron Company, and that they operate the collieries which the Temple Iron Company has bought, jointly. This showed the combination in restraint of trade.

Then there were the other contracts—the coal purchase contracts—which showed the discrimination. The independent operators through these contracts were allowed 65 per cent of the price of the coal at tide water, and when these contracts were made coal was selling at \$4—that is, the domestic sizes of coal—and this made the rate of transportation about \$1.40. It also relieved the operators who went into this contract of the cost of handling the coal, the cost of selling their coal, which I understand is about 15 cents, and it relieved them of the waste, which I understand is about 5 cents on a ton, therefore giving them an advantage over the men who did not make these contracts of about 35 cents a ton. This we considered discrimination, and the result of it of course was to force almost all the independent operators into these coal-purchase contracts. Then, when that was done, and there was practically no competition, the price of coal was put up to \$5, where it now is—between \$5 and \$5.50.

The CHAIRMAN. In your investigation there did you become familiar with the value of coal in the bank, the cost of mining, the cost of transporting to the centers, say Philadelphia and New York? In your investigations did you study those subjects?

Mr. HEARST. Yes, sir; more or less. I do not remember all the details of this case, especially the figures, prices, cost, and so forth. I would have to refer to memoranda for that.

The CHAIRMAN. You could not give us those figures as to the value of the coal in the mines, the cost of mining, the cost of transporting from the mines, and so forth?

Mr. HEARST. I do remember the cost of transportation from the fields to New York, which was developed to be not greater than 80 cents; and I remember that the rate is \$1.55. So that the profit is about 100 per cent, and the Interstate Commerce Commission had made a futile attempt to lower that rate.

The CHAIRMAN. Could you give the committee some idea of the value of the coal in the bank and of the cost of mining it?

Mr. HEARST. I can only do it—

The CHAIRMAN. Just approximately, if you can?

Mr. HEARST. I can do it only in this way, that I believe the defense entered a claim which they thought was to their advantage, that after the freight had been estimated at the rates that are published—that is, \$1.55—it only left a profit of about 7 cents a ton.

Mr. TOWNSEND. How much?

Mr. HEARST. Seven cents.

Mr. TOWNSEND. Seven cents?

Mr. HEARST. Yes, sir. Now, I think that is correct, but I can not recall all these figures without referring to documents.

The CHAIRMAN. That was their claim?

Mr. HEARST. Yes, sir.

The CHAIRMAN. You did not concede that to be true?

Mr. HEARST. We are disposed to accept it in a way, because it shows the outrageous character of the rate. They undoubtedly make a great deal of money, and it makes no difference to them, because they own the railroads and the coal mines, and if they fix the rate at such a point that it brings them a profit of only 7 cents a ton the independent operator, who does not own the railroads, but only a mine, is at a very distinct disadvantage, while the railroad operator, who owns both the mines and the railroad, can make his profit out of the railroad. That was their claim, as you say, Mr. Chairman, but I suppose we might be disposed to accept it on account of the deduction to be drawn from it.

The CHAIRMAN. According to that estimate, if the selling price of the coal was \$5 a ton in the market, the cost of transportation \$1.55, and there was only 7 cents of profit to them, then the value of the coal and the charges for mining must be something over \$3, according to that claim of theirs.

Mr. TOWNSEND. That includes the profit of the dealer?

The CHAIRMAN. No; I have included that in the profit of 7 cents.

Mr. RYAN. Was that profit of 7 cents independent of the \$5 selling price?

Mr. HEARST. I presume so.

The CHAIRMAN. That was substantially their claim?

Mr. HEARST. Yes, sir.

The CHAIRMAN. Was that true?

Mr. HEARST. I think not. But I would hesitate to go into the figures of this case very definitely without something to refer to, because figures are elusive things.

The CHAIRMAN. I would like to have a little approximate idea of how much the public are being robbed.

Mr. HEARST. I did not know that this case was to be investigated except as it related to the Interstate Commerce Commission, so that I did not fortify myself with these figures; but I will be glad to do it, if it is required.

The CHAIRMAN. If you will furnish us with a statement on these points we would be glad of it.

Mr. HEARST. I shall be delighted to do it. But what I wanted to bring out here were the facts as to the contracts that were called for, and their relevancy, and the difficulty that we had in securing them; and I wanted to say, further, that after all this delay the finding of the Interstate Commerce Commission will not be final, will not really be effective; it will only be a sort of recommendation, and in order to sustain it they will have to go into court and try the matter all over again, first before a circuit court, and if it is appealed, before the United States court. And after all those proceedings have been gone through, all they will have succeeded in establishing is that the present rate is unreasonable, and the road may go to work and put into effect another rate which is somewhat less, but almost equally unreasonable, and the whole thing will have to be taken up from the beginning again. That is, at least—

Mr. TOWNSEND. What is the number of your bill?

Mr. HEARST. No. 13778.

Mr. ADAMSON. I do not know whether you brought it out, or have stated it, but I would like to know whether you employed counsel in your case, or whether you relied upon the Government's counsel entirely?

Mr. HEARST. I employed counsel in my case. Now, the object of my bill is to obtain expedition and effectiveness in action. Its object is to give the Interstate Commerce Commission the power to fix a reasonable rate, and not merely to say, not merely to determine or succeed in bringing out that a certain rate is unreasonable; and the establishment of a court is in the interest of promptness, and other interests, too, to secure a more consecutive line of opinion, for instance, but chiefly to secure a prompt enforcement, by writ, of the orders of the Commission, and to enable the Commission to speedily get at the facts, and to effectively provide a remedy.

The first section deals with that:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter when the Interstate Commerce Commission shall, in any case pending before it under the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended or supplemented by other acts of Congress, decide that a rate for the transportation of freight or passengers is unreasonable or unjust it shall be the duty of the Commission, and it is hereby authorized and empowered, to fix a rate in lieu of the rate it has found unreasonable and unjust.*

Now, I understand that the constitutionality of that, or of a similar section in another bill, has been questioned before the committee, and while I do not pretend to be a lawyer at all, I have endeavored to deal as a layman with that point.

Mr. MANN. Does that provision relate to the Interstate Commerce Commission or to the court?

Mr. HEARST. It is to the Commission.



Mr. RICHARDSON. What is your authority that you propose for this Interstate Commerce court; it is final, is it not—you can not go beyond that except by certiorari to the Supreme Court?

Mr. HEARST. Yes. There is no appeal from it except where grave constitutional questions are involved. The Interstate Commerce Commission, probably under section 1, has an opportunity to move of its own motion, and that has seemed to be in accordance with the expression of the Supreme Court, in my case, that the shipper's complaint, or even the citizen's complaint, was not necessary; but it was in the power of the Commission, and it was the duty of the Commission, to investigate unjust and unreasonable conditions generally. I give them simply the power, then, in this: When they have found the rate unreasonable, to fix a reasonable rate; and I can refer the committee here to various decisions of the Supreme Court in which these points have been decided—the maximum-rate case and the Reagan case, for instance.

The CHAIRMAN. I do not think, Mr. Hearst, that that proposition troubles any member of the committee; at least I have not heard such expressions. The trouble, whatever there is of that character, is with reference to giving the court the power—a judicial body the power—to fix the rates.

Mr. HEARST. Yes.

Mr. MANN. For the future.

The CHAIRMAN. For the future.

Mr. RICHARDSON. Conferring any legislative power upon the Interstate Commerce Commission.

Mr. HEARST. Legislative power?

Mr. RICHARDSON. Yes, sir; delegating it, a power of Congress.

The CHAIRMAN. I would be glad to have that brief upon the record upon that other point.

Mr. HEARST. It is not really a brief. What I have here is just with regard to the right of Congress to delegate its legislative powers, and the references are made to the maximum-rate case, to the effect that Congress itself might prescribe rates, and to the Reagan case, to the effect that the power to fix rates is not within the absolute discretion of the carriers, but is subject to legislative control. The legislature has the power to fix rates, and this power can be delegated. According to the maximum-rate case Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty.

Mr. SHACKLEFORD. Could it confer the power upon the judiciary?

Mr. HEARST. It is conferring it upon the——

Mr. LAMAR. Is it seriously contended before this committee that Congress can not delegate its power to fix rates to a quasi legislative body or a legislative body like the board of commissioners?

Mr. RICHARDSON. I do not know if I understand this correctly, but the question is, as I understand, Can Congress delegate its legislative power to a commission that is judicial?

Mr. LAMAR. Is that a general question is dispute among lawyers?

The CHAIRMAN. No; the question, as I understand it, that involves difficulty is, Can Congress impose upon a judicial body the duty of fixing a future rate?

Mr. RICHARDSON. Then the further question is, if that is done, then a higher court could not revise that legislative authority. For instance, suppose that the right is given to this Interstate court, or as Mr. Hearst calls it—how do you name it?

The CHAIRMAN. Interstate commerce court.

Mr. RICHARDSON. Yes; the Interstate Commerce court. Suppose the right is given, as this bill gives it, to fix a rate; that is, conferring upon that court by Congress, legislative authority.

Mr. HEARST. This bill confers legislative authority on the Commission.

Mr. RICHARDSON. If that is a fact, could the Supreme Court of the United States revise that legislative authority we have delegated to the court that this bill creates?

Mr. LAMAR. That is not the intent of the bill, is it?

Mr. HEARST. No, sir.

Mr. RICHARDSON. That is the way that it strikes me.

Mr. HEARST. The bill delegates to the Interstate Commerce Commission the legislative power of Congress, and gives to the Commission the power to fix the rate.

Mr. RICHARDSON. I understand that, and then to this court—

Mr. HEARST. Is given the power to review the rate fixed by the Commission.

Mr. RICHARDSON. And confirm it.

Mr. HEARST. As the circuit court now has the authority, this court is simply constituted to take the place of the circuit court. It is not empowered to fix rates at all. I was proceeding to show that the Commission—

Mr. RICHARDSON. That very question rises right there, it seems to me, if I can understand you or make myself understood by you, that there would be conferred by this bill on the Interstate Commerce Commission, legislative authority.

Mr. HEARST. Yes, sir.

Mr. RICHARDSON. The authority to fix rates?

Mr. HEARST. Yes, sir.

Mr. RICHARDSON. Now, if they have got the legislative authority to fix rates, do you think the court that you make there as an appellate court would have a right, a judicial right, to pass upon a legislative act?

Mr. SHACKLEFORD. Might they not pass in that case upon whether the Commission had exceeded the legislative authority that is conferred upon it, and is not that the only question that does come into the court?

Mr. BURKE. As I understand it, the court might find that the rate fixed by the Commission was unreasonable, and this intends to give the court the power to fix a rate. Is not that the proposition?

Mr. HEARST. That is not the proposition of this bill.

Mr. SHACKLEFORD. I imagine that Mr. Hearst's bill intends to give the court the power to review the finding of the Commission and to say whether the Commission has exceeded its authority by passing a confiscatory or otherwise unjust rate?

Mr. HEARST. Yes, sir; that is it.

Mr. RICHARDSON. As I understand it, Mr. Burke, there is not a single bill, so far as I have read—I do not know that I have examined all of them carefully—that does not place somewhere the right to fix a rate.

Mr. HEARST. My bill does, but places that right with the Commission, where I think it belongs.

Mr. MANN. Let us take a specific case and see what your idea is as to the authority that is in your bill. Suppose the railroad rate from

Chicago to New York—the first-class rate—is 75 cents a hundred, and that complaint is made before the Commission, and the Commission decides that 50 cents a hundred is a reasonable rate. Suppose that that decision is appealed to the court which you propose to create and the court finds that that rate is unreasonably low. Now, under your bill, would the court, finding that 50 cents a hundred was unreasonably low, have the power at the same time to say what is a reasonable rate for the future?

Mr. HEARST. No, sir, not at all. The court will simply find that the finding of the Commission was unjust or confiscatory, and it would remand the case.

Mr. MANN. And have the Commission act again?

Mr. HEARST. Yes, sir. I suppose in the court's decision the Commission would find some light for its guidance in its further action.

Mr. ADAMSON. What reason can you assign that we should not empower a court to fix that rate right there?

Mr. MANN. You do not run against the question of the Constitution in your bill which has been bothering us, then?

Mr. HEARST. No. I simply wanted, in citing these cases, to show that Congress has a right to delegate its legislative powers to this Commission, and that it has a right to institute a court to review the action of the Commission, and to enforce by writ the orders of the Commission when they are approved.

Mr. ADAMSON. What reason do you assign, if a court may review the finding of a commission and determine it to be wrong, that we can not empower that court at the same time to render a final judgment in the matter?

Mr. HEARST. It seems to me to be outside of the functions of the court to fix a rate.

Mr. ADAMSON. If the court can review and undo a part of the action of the Commission, why can not they finish the job, if we authorize them to do so?

Mr. HEARST. It might be decided that you could not authorize them to do so.

Mr. ADAMSON. That is not the question that has concerned me. The idea that comes to my mind is, why should we take charge of other people's property and run their business without their consent?

Mr. HEARST. We are here to represent the people and to act for them, and if the majority of the people of this country are being oppressed in any way and unjustly treated, or unreasonably treated, we ought to seek some means of preventing it, even if we should to some extent regulate the business of the railroads without their consent.

Mr. ADAMSON. We have passed that proposition, and everybody has agreed that it is right to take charge and establish a tribunal to fix rates for the railroads. Now, you propose to constitute a separate body to review the findings of this Commission, to which we have delegated the power to fix rates, and that body may hear the case and decide that everything that has been done is wrong; and yet you say that you can not empower that court to finish the job and declare a final rate that shall prevail?

Mr. HEARST. It might be done, but I do not think that you can constitutionally do it. It may be so, but I do not think so; and consequently I did not put in my bill that clause.

Mr. ADAMSON. You have had in mind the decisions in the Supreme Court in which they have said they can not confer that authority upon the courts.

Mr. RICHARDSON. If I understood the question a few minutes since, you said in your answer that your bill did not come into conflict with the idea that there had been an expression on the power of Congress to delegate its legislative authority to the Interstate Commerce Commission; that is what I understood you to say, that this bill avoided that. If I understand your bill, from the reading that I have given it, it is, first, to give the Interstate Commerce Commission, where a rate has been challenged and investigated and found to be unreasonable, the power and authority then to substitute what is considered a reasonable and just and fair rate, right then and there?

Mr. HEARST. Yes, sir; to fix a rate.

Mr. RICHARDSON. And that, possibly, under certain conditions, and under limitations of time, it should go into effect. You have then constituted the interstate commerce court, to which an appeal can be taken. Now, when you get to that court, the court has only the authority to confirm or remand?

Mr. HEARST. Yes, sir.

Mr. RICHARDSON. That is all the authority that it has?

Mr. HEARST. Yes, sir.

Mr. RICHARDSON. Now, do you not think when you clothe the Interstate Commerce Commission with the authority to substitute a reasonable rate for a rate which is thought unreasonable, that that is vesting the Interstate Commerce Commission with the legislative authority?

Mr. HEARST. Yes, sir.

Mr. SHACKLEFORD. That has never been questioned by anybody.

The CHAIRMAN. I call your attention to this provision in the bill on page 9:

Said court shall thereupon, as speedily as may be, proceed to review the order appealed from, as to its justness, reasonableness, and lawfulness upon the said record returned by the Commission, and thereupon if, after hearing the parties, said court shall be of the opinion that such order is unjust, unreasonable, or unlawful, it shall modify, set aside, or annul the same by appropriate decree, or remand the cause to the Interstate Commerce Commission for a new or further hearing; otherwise the order of said Commission shall be affirmed.

Mr. HEARST. Yes, sir.

The CHAIRMAN. Now, there is the authority conferred to modify a rate.

Mr. HEARST. No, sir; I beg your pardon. At least, it is not necessarily meant to confer authority to modify a rate. It is meant to confer authority to modify orders of the Commission. Those orders do not all relate to rates. In my opinion it could not constitutionally modify a rate, but it could constitutionally modify other orders of the Commission, and it is only authorized to do what it can do constitutionally—at least, what we think it can constitutionally do.

The CHAIRMAN. Yes. Then if it can or could have the power under a law to perform this act—this legislative act, so called—then it could modify the order that would say a rate of 25 cents, for instance, is a just rate, and it could make it 22 cents, or it could make it 27 cents?

Mr. HEARST. Yes, if it has the constitutional right to do it, it could do it.

The CHAIRMAN. But you think that it has not the constitutional right?

Mr. HEARST. I think that it has not the constitutional right, but I think that it has the constitutional right to modify other orders of the Commission, which do not relate to rates, which might relate to classifications or schedules, or any of a number of other things.

The CHAIRMAN. Then we might not give to the Commission the power to fix a rate, or the court. Could not Congress require the court to review the action of the Commission fixing a rate, to say whether that rate is just and reasonable, and, if not, what rate would be just and reasonable, and then say that that rate, so found by them to be just and reasonable, should be the rate hereafter to be charged?

Mr. HEARST. Of course the court does that as far as it is constitutional for it to do it. It does it to this extent, that in rendering an opinion and in remanding the case to the Commission it gives its reasons for its opinion—its reasons why the rate is considered unreasonable—and the Commission, guided by that opinion, goes ahead and fixes the rate, with its legislative powers, as I do not think the court can fix is as a judicial tribunal.

The CHAIRMAN. In that instance the court would not be fixing the rates in contemplation of law; but the legislative act comes in there then, after it has completed its duty, and says that that rate that they have named shall be the lawful rate that shall be charged.

Mr. SHACKLEFORD. Now, in that connection, I want to ask a question.

The CHAIRMAN. I would like to have Mr. Hearst answer that—that is, if he has studied that branch of it.

Mr. HEARST. Of course I am a layman and I can not put my opinion up against that of distinguished lawyers, but I do not think that the court has the right to do that. I think that it has simply the right to pass on the findings of the Commission, and if it disapproves of the findings of the Commission it remands the cause to the Commission and the Commission goes ahead and fixes another rate in accordance with the decision of the court; but the decision of this legislative body to fix a rate does fix the rate, and the court, with its judicial power, reviews the action of the Commission.

The CHAIRMAN. After that, they having this power of reviewing, acting in this manner you have just spoken of, they remand the matter to the Commission, and the Commission, under the law, would then be required to fix the rate as suggested by the court. Now, the question I have suggested is, whether the legislature could do that without the necessity of remanding the case and the consumption of that time.

Mr. HEARST. I understand you, sir.

The CHAIRMAN. Because if the Commission carries out the suggestion of the court and fixes that particular rate, it will simply be exercising a legislative function that Congress has conferred upon it.

Mr. HEARST. Yes, sir.

The CHAIRMAN. Now, why, by this broad declaration that the rate that they have determined shall be the future rate to be charged, can not they avoid all that difficulty at the time, and fix future rates?

Mr. HEARST. I think it is simply a question of the constitutionality of that method.

Mr. SHACKLEFORD. I would like to make a suggestion right there.

Mr. WANGER. It would be desirable, if the court has the power,

that it should determine the matter without any further proceeding. Do you not think so?

Mr. HEARST. I do not know whether that would be more desirable than the procedure proposed in this bill.

Mr. SHACKLEFORD. In that connection, under the provision that this bill now contains authorizing the court to review and modify or remand, if the court should find it is clothed with constitutional power to fix a rate instead of a rate that had been fixed by the Commission, would it not have authority to do that under the provision of your bill which says that it might modify an order?

Mr. HEARST. Most certainly it would have power to do it.

Mr. SHACKLEFORD. Would not the matter that the chairman speaks of be embraced in your bill under that clause, giving it the power to modify a finding of the Commission?

Mr. HEARST. I think so.

The CHAIRMAN. I was under the impression that the power of the Commission to act after the remanding of the case in conjunction and in harmony with the suggestion of the court would depend upon the act of Congress that gave them this legislative power to fix the rates. In other words, the Commission borrow their power from the courts. Now, it occurs to me that if we could do that, about which I have no doubt, we could also, without any question, by enactment say that the rate which was modified by the Commission—that they had determined would be a just rate—might be legislated into virility and force by such language as I have used: "And this rate, so determined, shall, after notice, be the lawful rate to be charged for this service."

Mr. HEARST. The point is that the bill provides that, if it is constitutional.

The CHAIRMAN. No; I think not. Oh, it provides—

Mr. HEARST. It provides it in the word "modify."

The CHAIRMAN. Yes; but it does not contain this other, to my mind essential, provision, that the rate, as it is modified, shall be thereafter the lawful rate. Then, the rate gets its sanction and its power from this sentence of the law, this declaration.

Mr. HEARST. It seems to me that the bill does give the court that power, provided that power can be constitutionally given to the court, by the use of the word "modify." But I say it is only a matter of my opinion. I do not presume to put my opinion up against yours; but my opinion is that Congress can not give the court that power; but if it can, the court has it under the phraseology of my bill, and if it can not, then that phraseology applies merely to other orders where the court obviously has the power.

The CHAIRMAN. I am afraid that you do not get my idea with regard to this matter. I am trying to avoid the difficulty of conferring this legislative power upon a judicial body.

Mr. HEARST. Yes, sir.

The CHAIRMAN. I say, I think there may be very great difficulty in doing it; and we may not have the power to do it. I am trying to avoid it by requiring there what may be perhaps considered a ministerial act, namely, after they have investigated one of these cases, and found that the rate is unreasonable, which we undoubtedly may do, then requiring them to go one step further and say what would be a reasonable rate, not for the purpose of their putting that rate into

effect, not for the purpose of making that action a part of a decree that would be carried out as a decree, but simply for the purpose of stating a fact; and then the law comes in and says that that rate which they have thus named shall be the future rate to be charged. I am afraid that you did not get the idea that I had in this suggestion. I have not any doubt myself about our power to do that, and I think that is the solution of this constitutional difficulty.

Mr. KYLE. Would not that be in effect the same as if the Commission then established that rate?

The CHAIRMAN. No; it would not be the same, because it then becomes the direct act of the Congress.

Mr. ADAMSON. The witness is now right at the point where I had him when I asked him my last question, and I would like to go on from there if you have finished.

The CHAIRMAN. I am through with this, if Mr. Hearst gets my idea.

Mr. HEARST. I think I do; but I do not see the advantage of a doubtful method of fixing a rate by a court when the clearly constitutional method of fixing the rate by a commission is available.

The CHAIRMAN. Have you thought of this matter, and have you an opinion as to whether this method would be operative and would overcome that constitutional difficulty?

Mr. HEARST. Of course I did think of the various difficulties, and doubtless that, or something like that, occurred to me; and in framing the bill in this way it seemed to me the possible difficulties—all possible difficulties—that might arise would be avoided, because there is no question of the powers as given to the Commission and as given to the court, as herein set forth. And the delay is inconsiderable compared with the delays that occur now. The greatest saving of time and machinery and expense is provided for in this bill. And it insures, I think, beyond question the procedure of the Commission and the court being constitutional and being supported by the Supreme Court.

Mr. ADAMSON. Now, Mr. Chairman, this matter that I want to pursue will not disturb your line of questions. It is entirely in line with yours.

I was asking you, Mr. Hearst, a few minutes ago, what reason you could give why, in constituting a court for review of the finding of the Commission with authority to judge the rates fixed by that Commission, and to adjudge what its rates should be, it could not be empowered by us, endowed with the authority, to declare what would be a just and proper rate, and why we should not then, in the same act, legislate that that should be the future rate.

Mr. HEARST. Yes, sir.

Mr. ADAMSON. And you said in answer to Mr. Mann that perhaps you could not do that. You did not fully answer that. Now, I want to know, when this court is constituted by us with power to say what a just and proper rate would be, if we could not by enactment, the same act, provide that that rate so found by them should be the future rate? There has never been any decision to the effect that that could not be done, has there?

Mr. HEARST. There has never been any decision of the Supreme Court as to this court, because this court has not yet been established; but it has been decided to be unconstitutional to give that authority to a court.

Mr. ADAMSON. What provision of the Constitution says that?

Mr. HEARST. The clause of the Constitution separating the executive, legislative, and judiciary.

Mr. ADAMSON. I am trying to get your views, now. I notice that Judge Lamar made a suggestion to you which I did not hear. He is a good lawyer, of course—

Mr. HEARST. You may be equally confident that I am not, and I am very willing to hear a suggestion, because I suppose you are more anxious to get the real facts of the case than you are to get my views.

Mr. LAMAR. I suggested the fact of the broad distinction between the legislative and judicial functions.

Mr. ADAMSON. I asked him if he knew of any other reason except that distinction.

Mr. LAMAR. That is broad enough.

Mr. HEARST. I can only repeat what I have said, that under this phraseology—

Mr. ADAMSON. I am not asking you with reference to any bill. I have no idea that any bill now before Congress will become a law. We are trying to find out what is right, and to make and report a bill, which I believe will be done. I am asking you the abstract question as to doing or not doing the particular thing. Now, you do not think that the provision as to the integrity and keeping separate of the three departments of the Government would prohibit the legislation suggested to you by the chairman?

Mr. HEARST. I think that it might, and I think that if it did prevent it, my bill would stand, and if it did not prevent it, they would be able to proceed under the word "modify," as you wish them to proceed, and it does not seem to me advantageous to go the length of putting in a clause which might be considered unconstitutional, when they have the privilege, under the phraseology that exists in this bill, of doing the very thing that you desire them to do.

Mr. ADAMSON. Can you tell me how it would be mixing the two departments under the Constitution, under the law we are going to pass, to declare that whatever rate the court shall declare would be or would have been a just and reasonable rate, shall become the law? The court has not a thing to do with making the law. This Congress makes the law, and it seems to me that it provides for the judicial interpretation.

Mr. HEARST. All right if it can do that; it can do it under this bill.

The CHAIRMAN. Taking this act of yours, and leaving the word "modify" just as it is, and all of that sentence just as it is, would it strengthen it to add, in the appropriate place—I do not know just where it would come—a provision that the rate so approved or so modified by the court should be the lawful rate thereafter to be charged by the carriers? Would that strengthen it?

Mr. HEARST. That assumes that the court may modify a rate?

The CHAIRMAN. Yes.

Mr. HEARST. I have not assumed that.

The CHAIRMAN. What is the office, then, of the word "modify?" That relates to some other proceeding in your mind other than the—

Mr. HEARST. Any orders of the Commission that the court can modify. Now, it obviously can modify certain orders of the Commission, and it can possibly modify all orders of the Commission, and if it can not it will be confined to those which it can constitutionally modify. If it can modify the rate it will go ahead and modify, and



state a definite rate and fix a rate; but I repeat I do not think the court fix a rate.

Mr. TOWNSEND. As I understand it, your bill makes provision for the Interstate Commerce Commission to take testimony necessary, and if a rate shall be found unreasonable should determine what is a reasonable rate. Now, if that is not satisfactory to the defendant, he takes an appeal to this interstate court that you have provided?

Mr. HEARST. Yes, sir.

Mr. TOWNSEND. And that interstate court passes upon the lawfulness, if I may use that word, to cover all cases in which an appeal may be taken—the lawfulness of the order of the Commission. And if that court finds that the Commission has made a lawful rate, then that rate immediately stands, does it not?

Mr. HEARST. Yes, sir.

Mr. TOWNSEND. If it finds it has not made a lawful rate, then it is remanded for further hearing?

Mr. HEARST. Yes, sir.

Mr. SHACKLEFORD. Unless modified?

Mr. TOWNSEND. No; I do not want to say “modified.” Now, I am talking on the supposition, as I agree with Mr. Mann on that, that it seems to me that the Supreme Court would hold that the court could not make that rate. As I understand from your bill here, a rate does stand, if it is decided by the Supreme Court that the Commission made a lawful rate?

Mr. HEARST. Yes, sir.

Mr. STEVENS. Let me ask one concrete question, to get it in such shape that we can find the distinction. Suppose that the railroad was charging 12 cents a hundred, and that rate was challenged on the ground that it was unreasonable, and the Commission made an order fixing it at 8 cents a hundred; then suppose that an appeal for review was taken, and the case went to this court on that. The person who challenged that rate demanded reparation for the injustice done in the difference between 8 cents and 12 cents a hundred, and demanded that no greater rate in the future should be charged than the just and reasonable rate. Now, the rate fixed by the Commission was 8 cents a hundred, and it was brought to this court, and the court said that 8 cents a hundred was too low, and that 10 cents a hundred was a just and reasonable rate, and ordered reparation for the past and enjoined them from charging more than 10 cents in the future. That is constitutional. That is a perfect exercise of judicial authority up to that point, is it not? Your bill would give the court authority to do that in that kind of a case?

Mr. HEARST. May I have that question read to me?

Mr. STEVENS. I think I can probably restate it more plainly. Suppose that a rate of 12 cents a hundred is charged by a railroad company, and that rate is challenged by the Commission on the ground that it is unfair and unjust and unreasonable, and the man who brings the complaint demands reparation due to him on account of that unjust charge. The Interstate Commerce Commission hears the case, as provided by your bill, and fixes the rate at 8 cents a hundred as a just, fair, and reasonable rate, and grants him reparation. A review is then taken to the court provided for in your bill. On that review the court makes this decree, that the rate of 8 cents is confiscatory—too low—and that a rate of 10 cents is just, fair, and reasonable, and grants

him reparation for the past, and enjoins the railroad against charging more than 10 cents for the future. Is not that a perfect exercise of judicial authority authorized by the Constitution in such cases?

Mr. HEARST. It seems to me that that is merely a more complicated way of stating the previous proposition—that the court has a right to fix the rate?

Mr. STEVENS. I am just asking your opinion on that subject. Does that confer upon the court that equitable authority to enjoin for the future the exercise of an illegal rate, up to a certain point?

Mr. HEARST. I have endeavored to frame this bill so that the court would have authority to act up to its constitutional right.

Mr. STEVENS. If it should be held that that was an exercise of judicial authority, that the court would be obliged to declare, in view of that provision, what was a reasonable rate for the past years, and to compel reparation, it would exercise its equitable functions and forbid charging any more than an equitable rate for the future, which it seems to me it has a right to do now, has not Congress a right, then, to declare that a rate for that class of business, under those circumstances, is a fair, just, and reasonable rate, and should be the rate for the future for everybody? Has not Congress a right to do that?

Mr. HEARST. Yes, sir.

Mr. SHACKLEFORD. If Congress has the right to do that, is not that right given in the words authorizing the court to modify the orders of the Commission?

The CHAIRMAN. No, sir.

Mr. MANN. I think you will agree the Supreme Court has decided that the judicial authority has not the power of determining what is a reasonable rate for the future. We understand the decisions to be that way; that it has always declared that the judicial authority has the power to declare what is a reasonable rate for to-day, or what was a reasonable rate when their service was rendered in the past.

Mr. HEARST. Yes, sir.

Mr. MANN. Now, would it not be entirely competent, in accordance with the suggestion made by the chairman, for us to require the court to decide in a certain case what is the reasonable rate at the time of the hearing; that the rate in existence, not a future rate, is reasonable, and then to legislatively say, when that has been adjudicated, when the court has decided what is a reasonable rate at the time of the hearing, that that rate shall be the reasonable rate and enforced by the courts for the future, that being a legislative act?

Mr. HEARST. I doubt it, but possibly it can do that.

Mr. MANN. Can there be any question about it? It is not the court declaring what is a reasonable rate for the future. It is the court exercising its common-law jurisdiction.

Mr. LAMAR. The rate that you speak of is the rate already in litigation and pending before the court to be passed upon, or is it a supposititious rate?

Mr. MANN. Suppose that we provide that a complaint shall be made as to an existing rate, any shipper would have the authority to bring a common-law suit. We may provide a different form of action, requiring the court or Commission to determine what is the reasonable rate at the time. That is the common-law duty of the court. And when that is adjudicated, why can not we legislatively say that that shall be considered and be the reasonable rate for the future?

Mr. TOWNSEND. Does any other bill have any other object in view than that?

Mr. MANN. Every other bill, and everything else, except what I have just heard here in the way of suggestion by the chairman, is to the effect that the court shall determine what is a reasonable rate for the future.

Mr. SHACKLEFORD. Let me ask you a question. If the court should do what you say, would it not take the form of a judgment, and being in the form of a judgment, would the Commission have any right thereafter, under changed conditions, to regulate that rate again until it had proceeded to have that judgment vacated and set aside?

Mr. MANN. Any bill covering that question will of course provide a method for reviewing the rates fixed in that manner, just as any other rate may be reviewed.

Mr. RICHARDSON. May I ask a question?

Mr. SHACKLEFORD. Mr. Hearst has not yet answered Mr. Mann's question.

Mr. RICHARDSON. Excuse me; I did not know he had not answered Mr. Mann's question.

Mr. HEARST. I simply wanted to repeat what I have said, that there is no doubt of the right of Congress to delegate its legislative function to the Commission, and there is no doubt of its right to constitute a court to review the decisions of the Commission, and there is no doubt, first, that it is an entirely legal system of procedure, and that it is also an extremely prompt system of procedure.

Mr. RICHARDSON. Under your bill the Commission have power to raise rates when they find them discriminative?

Mr. HEARST. Yes, sir; they have.

Mr. RICHARDSON. To raise a rate when it is too low?

Mr. HEARST. Yes, sir; the Commission has that power here, if it has fixed a rate that becomes too low.

Mr. RICHARDSON. Suppose that the rate is fixed originally for the purpose of discrimination, does your bill give the Commission the power to raise it if it is too low?

Mr. HEARST. Yes, sir; it gives it the right to fix a rate, and if it has the power to fix a rate, I suppose it would unquestionably have the right to raise a rate.

Mr. RICHARDSON. You know that often occurs in the matter of discrimination; that is what makes discrimination, often, locally.

Mr. HEARST. Yes, sir.

Mr. SHACKLEFORD. It has that right already under the power to regulate.

Mr. HEARST. Yes, sir.

The CHAIRMAN. I would like to pursue this matter further. In calling your attention to the authority given on page 10, line 2, "it shall modify, set aside, or annul the same by appropriate decree or remand the cause to the Interstate Commerce Commission for a new or further hearing," in your judgment, would that authority to remand for further hearing permit the court to determine the lines on which that rehearing would be had? as, for instance, they might say that the rate fixed by the Commission as just and reasonable was, in their judgment, either too high or too low, and they not having the power to fix the rate themselves, they chose to remand it to the Commission with

the instruction to fix a rate lower or higher. Do you think they should have that power?

Mr. HEARST. You mean to positively direct the Commission what rate to fix?

The CHAIRMAN. Well, in their judgment.

Mr. HEARST. Of course their opinion would naturally be that. In giving their opinion they would give their reasons for it, and that opinion would guide the Commission in fixing the subsequent rate. In other words, it would endeavor to fix the rate in accordance with the decision of the court.

The CHAIRMAN. Then that power to remand would substantially give to them the power of determining what the action of the Commission should be—as is usually the case in the case of a court of equity in remanding a case, or in remanding an equity case for further proceeding—of indicating what should be the line of conduct.

Mr. HEARST. Yes, sir; it would certainly tell them what they could not do, and that would enlighten them as to what they could do, and the opinion of the court in details would enlighten them, to a considerable extent, and perhaps altogether as to what they could do; as to what rates would pass the censorship of the court.

The CHAIRMAN. The thing that I want particularly to get your opinion about is as to whether this Congress can require a judicial body to say to the Commission what line of conduct they are to pursue in case the cause is remanded to them.

Mr. HEARST. That is the whole point at issue, the whole point upon which I have expressed the opinion that I do not think they can go to the extent of fixing the rate definitely themselves.

Mr. ADAMSON. If they can not do it, can they help do it?

Mr. HEARST. Yes, sir; because their opinion materially assists the Commission in fixing it.

Mr. ADAMSON. If they can not do it, what right have they to tell another body to do it?

Mr. HEARST. They are not telling another body to do it; they are telling another body what can not get through that court.

Mr. ADAMSON. In other words, to pass on their future action in advance.

Mr. HEARST. That is what every court has the right to do; they have the right to reverse——

Mr. ADAMSON. A lower court?

Mr. HEARST. Yes, sir.

Mr. RICHARDSON. Mr. Adamson, your question goes to the point of whether the Supreme Court of the United States, the court of last resort——

Mr. ADAMSON. I have never heard anybody deny that the upper court could give instructions to the lower court whose judgments are sent to it.

Mr. LAMAR. The courts can challenge the reasonable rate, and declare that the legislative power can not confiscate a railroad's property.

Mr. ADAMSON. This is a distinct court, and it is a court that you say can not fix a rate, and yet you say, though it can not do it, it can tell another body how to do it.

Mr. LAMAR. It can not legislate, but it can declare under its powers——

The CHAIRMAN. That is what I want to know, can we require them to declare?

Mr. LAMAR. I should say not. The Congress of the United States, the legislative body, can not indirectly make the Constitution of the United States different from what it has been fixed. Within their constitutional functions they can adjudicate questions of property or judicial rights. They can find questions of fact within their functions.

Mr. STEVENS. Then it will be necessary for them to adjudicate what is the fact in a particular case.

Mr. LAMAR. They can adjudicate what is a reasonable rate and declare whether it should exist.

Mr. HEARST. I was reading from the first paragraph of my bill. Section 6 enumerates orders that may be issued by the Commission.

Section 6 is as follows:

■ That when in any investigation made by the Interstate Commerce Commission it shall be made to appear to the satisfaction of the Commission that anything has been done or omitted to be done by any common carrier, respondent or defendant, in such proceeding in violation of the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, or any act amendatory thereof or supplemental thereto, or of the provisions of this act, it shall be the duty of the said Commission forthwith to cause a copy of its report in respect thereto to be delivered to such common carrier, together with an order or orders directing such common carrier, its officers and agents, and any receiver or trustee of its property, to wholly cease and desist from such violation, and to establish, put into effect, and maintain such individual rate, fare, charge, relation of rates, fares, or charges, joint rate, fare or charge, and division thereof, classification of freight articles involved in the proceeding through and continuous carriage over connecting lines or roads, including intersecting switches or connections, and regulations concerning transportation, including the furnishing and apportionment of cars, the provision of other facilities connected with or incidental to transportation, and the receiving, forwarding, and delivery of traffic, as in the judgment of said Commission may be necessary to prevent the continuance in any degree of such violation. That whenever any common carrier, subject to the provisions of this act, shall fail or refuse after reasonable notice to furnish cars to shippers for the transportation of freight as interstate commerce, or to forward and deliver such freight at destination within a reasonable time, such failure or refusal shall be deemed to constitute unjust discrimination and undue and unreasonable prejudice and disadvantage, and in any case or proceeding pending before the Commission or any circuit or district court of the United States based upon such failure or refusal on the part of any such common carrier, proof that, in the furnishing of cars or forwarding or delivery of its traffic, other shippers have been preferred shall not be required.

The CHAIRMAN. You have passed over section 2?

Mr. HEARST. Yes, sir; because I was proceeding primarily with the powers given to the Interstate Commerce Commission, then passing to the character of the orders that they may issue, and then coming to section 7, which tells how the above-described orders shall become effective. Section 8 deals with "The Court of Interstate Commerce."

The CHAIRMAN. I would like to ask you if it was intended by the language of section 2 to bring ocean carrying within the purview of the interstate commerce act?

Mr. HEARST. The language there is, "and also to such transportation over any part water and part rail route used for through shipment or through carriage." Yes, sir; I should think that covers coast transportation—

The CHAIRMAN. By water.

Mr. HEARST. This is designed to bring under the action of the Commission the independent water lines that are engaged in forwarding interstate commerce, and which are not under the provisions of the

present act, I believe, unless they are owned by one of the railroads which is engaged in interstate commerce. It is practically what Mr. Spencer, I think, said was desirable, a day or two ago.

The CHAIRMAN. Do not the provisions of that section require the foreign vessel engaged in interstate commerce to file a schedule of tariffs, and would the joint tariffs between a railway and such a vessel have to be filed?

Mr. HEARST. I had not considered that particular relation of it. I had considered it particularly in regard to lesser water lines.

The CHAIRMAN. Yes; the lakes and rivers?

Mr. HEARST. Yes, sir. Section 3 reads:

SEC. 3. That when the rate fixed by the Commission is a joint rate and the carriers parties thereto fail to agree upon the apportionment thereof among themselves within twenty days after notice of such order, the Commission may issue a supplemental order fixing the portion of such joint rate to be received by each carrier party thereto.

That seems to be necessary in order to carry out the first order of the Commission.

Mr. SHACKLEFORD. Does that not apply simply where the rate is part rail and part water; is not that the limit to which that is intended to go?

Mr. HEARST. That is the limit that I considered.

Mr. RICHARDSON. Does not your language there, "through shipment," indicate that very thing—that it does apply to this country?

Mr. HEARST. This country, necessarily.

Mr. RICHARDSON. You do not intend it to apply to any water route except to a route that is a continuous one—part water and part rail?

Mr. HEARST. That is my view.

Mr. MANN. Would that apply to the shipment of wheat or corn from New York to Liverpool?

Mr. SHACKLEFORD. That is foreign commerce and not interstate commerce. Would that not be foreign commerce?

Mr. HEARST. If the Interstate Commerce Commission were given power to regulate that, it might, but it has not the power.

Mr. MANN. The Supreme Court has decided that the present law does not cover such a case as that.

Mr. HEARST. I should think—

Mr. MANN. It has always seemed to me that it might properly cover a case of that kind, and I have wondered whether your bill provided that it should or not.

Mr. HEARST. Section 4 reads:

SEC. 4. That it shall not be lawful for any common carrier subject to any of said acts, or any company or person acting for or in the stead of such common carrier, to advance, reduce, or cancel any individual or joint rate, fare, or charge now or hereafter in force over the route or line of such common carrier unless or until notice thereof, plainly showing the change intended to be made in such rate, fare, or charge, and the date when the same shall take effect, shall have been filed with the Interstate Commerce Commission and posted in all depots or stations where passengers or freight are received for transportation under such rate, fare, or charge, for at least thirty days prior to the date when such change is to become effective.

That is simply a modification of existing laws which require that if a rate is to be raised ten days' notice shall be given and filed, and if a rate is to be lowered three days' notice shall be given. That increases the time to 30 days in the interest of the shipper, believing that the

third provision gives opportunity for discriminating rates. Section 4 continues:

*Provided, however,* That said Commission may, for good cause shown, upon special application, allow a particular rate, fare, or charge to be changed upon shorter notice published and filed as aforesaid. No joint rate, fare, or charge shall become effective until all carriers named as parties thereto shall have concurred therein by signing the rate schedule or filing general authorization or specific notice of concurrence with the Commission.

I think that this is generally in effect now, at least by agreement; but I have made it a part of this bill in order that no railroad shall post a rate and lead a shipper to ship his goods over connecting roads, only to find out that the rate is not concurred in by the other roads.

Mr. MANN. Is there anything in your bill, in that connection, that will prevent putting into operation what they call "midnight rates?"

Mr. HEARST. What is a midnight rate? I am not familiar with that.

Mr. MANN. Then I will not go any further on that. That is one method of evading rates.

Mr. RICHARDSON. Known to Chicago? [Laughter.]

Mr. SHACKLEFORD. Is that practiced to any extent in the West?

Mr. MANN. It is practiced wherever they have a cutthroat road, and it is practiced very extensively in various parts of the country, I believe, so they say.

Mr. HEARST (continuing reading):

and any common carrier enforcing any schedule or joint rates, fares, or charges which shall not have been concurred in by all carriers parties thereto, or any schedule of rates, fares, or charges which shall not have been published and filed as required by this section, shall be subject to a forfeiture of one hundred dollars for each day such unlawful tariff shall be published or enforced. The said Commission may prescribe the form, contents, and arrangement of all schedules of rates, fares, and charges, and it shall be the duty of said Commission to make orders from time to time, as may be practicable, with a view of securing uniformity in freight classification and the use of rate schedules containing concise and easily understood provisions and regulations.

These provisions are all merely designed to simplify and make the schedules intelligible, because I understand they are now only to be interpreted by an expert, and to secure business simplicity and system as far as may be for the convenience of shippers, and in the classification of rates. Shall I call attention to some of these other points?

The CHAIRMAN. Certainly. That is what we desire you to do.

Mr. HEARST. I see that it is getting pretty late, Mr. Chairman.

The CHAIRMAN. You will not be able to get through to-day?

Mr. HEARST. I am afraid not.

The CHAIRMAN. We will have to adjourn at 12 o'clock, and if you will suspend now and resume to-morrow morning at half-past 10, we will be glad.

Mr. HEARST. Very well.

(Thereupon, at 12 o'clock m., the committee adjourned until to-morrow, Tuesday, January 17, 1905, at 10.30 o'clock a. m.)

TUESDAY *January 17, 1905.*

The committee met at 10.30 o'clock a. m., Hon. William P. Hepburn in the chair.

**STATEMENT OF MR. G. WALDO SMITH.**

Mr. SMITH. I would like to present the views expressed in a report to the New York Board of Trade and Transportation.

The CHAIRMAN. How long would this take you?

Mr. SMITH. I think it will take only about five or eight minutes.

The CHAIRMAN. Proceed.

Mr. Smith read the report referred to, as follows:

EVILS OF INTERSTATE COMMERCE—QUARLES-COOPER BILL DEFECTIVE—A JOINT CONGRESSIONAL COMMISSION ON INTERSTATE COMMERCE FAVORED.

ROOMS OF THE NEW YORK BOARD OF TRADE AND TRANSPORTATION,  
*New York, December 28, 1904.*

*To the New York Board of Trade and Transportation.*

GENTLEMEN: Your committee on railway transportation on the 27th of January last submitted to you a report giving reasons why you should oppose the Quarles-Cooper bill amending the interstate-commerce law. That report you adopted unanimously. We now have the honor to submit a further report in support of your action.

The more we have studied the evils and abuses of interstate commerce, the firmer are we of the opinion that the Quarles-Cooper bill will not in any desirable way add to the effectiveness of the existing lawful remedy.

The delay, incident to the enforcement of existing law, was one of its chief weaknesses, but that condition has been in a large degree remedied since the passage of the Elkins law February 19, 1903.

That the Quarles-Cooper bill would make no improvement in expediting the trial of complaints is evidenced by the criticism of its provisions made by Hon. John D. Kernan in his address before the interstate-commerce law convention held in St. Louis last October. Mr. Kernan was urging the importance of an amendment to the bill which was designed to hasten the taking of additional testimony if required by the courts, and his conception of what the experience would be under the Quarles-Cooper bill without his amendment is indicated by his remark, as follows: Mr. Kernan said:

"After a shipper, whose complaint is filed in his youth, dies of old age the disposition of his case is of no use to his business."

The amendment proposed by Mr. Kernan was suggested to Mr. E. P. Bacon in these rooms last year and he, after consultation with his counsel, rejected it as being unconstitutional, and the bill in this respect remains hopelessly defective.

The greatest evils now complained of are those growing out of the private car line, private terminal-track and side-track systems. It is not claimed by its supporters, and can not be demonstrated, that the Quarles-Cooper bill will in the slightest degree affect these abuses.

The private car companies deny that they are under the provisions of the interstate-commerce law, and the Interstate Commerce Commission has not determined their status, neither have the courts adjudged them to be subject to such law.

The language of the Elkins law is as follows:

"And it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced."

This would seem to warrant a belief that it is sufficient to reach such devices. If it is not so, it should be made so. These private car-line, private terminal-track and side-track systems are devices by which, among other things accomplished, the grossest discriminations are made and rebates given. The method of evading the law, if effective to that end, is very simple. The shipper pays his freight to the railroad company. The charge so paid is the lawful tariff rate plus the regular charge for the



use of the private car. The railroad company in turn settles with the private car company. Finally, the private car company pays to the shipper the rebate previously guaranteed to him. The shipper, having been assured of his rebate in advance of the transportation, has been able to calculate in his own transactions the ultimate return to himself of the amount agreed upon. By this device his goods have been transported at a less rate than those of his competitor, and he has enjoyed an advantage over him to that extent.

But these are evils which, if not reached by the broad, comprehensive, far-reaching provisions of the Elkins law, as supplementary to the interstate-commerce act, could not be reached by the Quarles-Cooper bill. All other known forms of discrimination and preference between shippers are now forbidden by the Elkins law, and summary methods of proceeding by the courts are provided with penalties seemingly adequate, if enforced, to deter such practices.

Mr. E. P. Bacon, of Milwaukee, the distinguished and able leader of the advocates of the Quarles-Cooper bill, wrote this board October 5, 1903, as follows:

"The Elkins bill, which was enacted at the last session, seems to provide the most effectual means possible of preventing such discrimination (between shippers), either in the granting of preferential rates or the paying of rebates or by any other device. The legislation on this point seems to be as complete as it is possible to make it."

The consideration of the Quarles-Cooper bill has thus far been mainly confined to a discussion of the rate-making powers provided. This is a very important feature of the measure. Intelligent men honestly differ as to the propriety of giving such power to the Commission. The advocates of the bill deny that it gives that power except in cases determined by the Commission upon complaint, but that it empowers the Commission to require the substitution in future shipments of a rate declared to be reasonable for one declared to be unreasonable.

This provision, it is declared, would require the substitution "for the future" of the rate named by the Commission, but it must be observed that this interpretation of its meaning is the purest assumption, as the words "for the future" do not appear in the bill. These words, "for the future," were in all the original bills and in the draft of the Quarles-Cooper bill, but before its introduction in the present Congress they were stricken out by Mr. Bacon and his counsel, lest their presence would cause the courts to adjudge the bill unconstitutional. Thus the bill is intended by its advocates to accomplish by obscure language the doing of something which, if plainly declared, they themselves believed unconstitutional. It is not probable that the eye of the Supreme Court of the United States would fail to penetrate this disguise.

But this provision is open to a radically different construction, which, if held, will utterly confound those who, trusting to their leaders, look for relief from its passage.

As stated above, it is intended that the rate substituted by the Commission for the rate complained against shall apply to future shipments. Serious doubt can well be raised that this construction would be sustained. A complaint is made against the validity of a specific charge or rate made upon a specific shipment. The case is tried and determined, as Mr. Kernan said, after the complainant "has died of old age." The difference between the shipper and railroad on that shipment is adjusted, but there is nothing in the bill which provides that the railroad shall not charge the same rate upon the next shipment, and the framers of this bill dare not make the language so as to explicitly provide that the corrected rate shall apply "for the future."

The existing Elkins law, on the other hand, does not run amuck with any such doubtful construction of its terms.

But it is said it gives the Commission no power to correct the rates or to declare a lawful rate. The Elkins Act is specific in forbidding any unlawful rate and clearly elucidates what rates are unlawful. It with equal directness declares the "tariffs published and filed by such carrier" to be lawful. The Commission after investigation could do no more. If the carriers are held rigidly to their tariff rates it matters not much what those tariffs are if all shippers are charged and required to pay alike, and excessive tariff rates are no longer to be accounted with to the same extent as formerly. Hon. Martin A. Knapp, chairman of the Commission, at a public hearing before the Senate Committee on Interstate Commerce, March 18, 1898, made the following declaration:

"The question of excessive rates, that is to say, railroad charges, which in and of themselves are extortionate, is pretty nearly an obsolete question."

Furthermore, the penalties under the Elkins law are heavier. In this respect it provides that—

"Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be guilty of a misde-

meanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

The corresponding provisions of the Quarles-Cooper bill are as follows:

"The offending party shall be subject to a penalty of five thousand dollars for each day of the continuance of such violation which, together with costs of suit, shall be recoverable by said Commission by action of debt in any circuit court of the United States, and when so recovered shall be for the use of the United States."

This provision of a per diem penalty was manifestly written to fit the bill when it contained the words "for the future," and is doubtless retained in the belief that the bill would apply to future shipments. The maximum penalty therefore is \$5,000 per day under the Quarles-Cooper bill, whereas under the Elkins law each and every specific violation of the act is an offense punishable by a fine of \$20,000, whether there is one offense per day or one hundred offenses per day, each paying a penalty.

And again, the Quarles-Cooper bill provides that the penalty "shall be recoverable by said Commission by action of debt," requiring such special litigation subject to delays and doubts of ever reaching a conclusion or that the penalty would ever be actually imposed.

On the other hand the Elkins law provides that offending persons upon conviction of the offense "shall be deemed guilty of a misdemeanor 'and' shall be punished by a fine," etc.

It seems to us that the advocates of the measure made a fatal confession of the serious doubt they entertained of its constitutionality when they struck from it the words "for the future."

This raises the question as to whether the Federal judiciary would in any event pass upon a rate for the future prescribed by an administrative board, and this does not appear to be involved in any doubt. This is indicated as follows:

1. In deciding the Maximum Rate Case (167 U. S., 479), the Supreme Court of the United States said:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

2. At a hearing before the Senate Committee on Interstate Commerce on March 10, 1898 (p. 9 of the hearings), Hon. Martin A. Knapp, chairman of the Interstate Commerce Commission, said:

"One doctrine is now settled—that whereas the investigation of the question whether an existing rate is a reasonable and lawful one or not is a judicial question, the determination of what that rate shall be in the future is a legislative or administrative question with which the courts can have nothing to do."

3. At a hearing before the Senate Committee on Interstate Commerce on February 21, 1900, at page 118 of the hearings, Hon. Charles A. Prouty, Interstate Commerce Commissioner, said:

"The prescribing of a rate is, under the decisions of the Supreme Court, a legislative, not a judicial function, and for that reason the courts could not, even if Congress so elected, be invested with that authority."

And yet the advocates of the Quarles-Cooper bill propose that Congress shall elect to require the Federal judiciary to pass upon a rate for the future prescribed by the Commission.

Thus far we have omitted to refer to the provisions of the second section of the Quarles-Cooper bill which invests the Commission with the power "to prescribe the just relation of rates to or from common points." This feature, we think, requires some attention, as it is perhaps the most important provision in the bill as relating to the interests of the city of New York.

To illustrate what the effect of this provision would be, we state that, if this second section is enacted, it will give the Interstate Commerce Commission the power to fix rates and to determine absolutely what differentials shall exist as between New York, Philadelphia, Baltimore, and Boston from Chicago or any other common point; also what just relation of rates shall be enforced as between Chicago and New York to common points in the South.

This means that an autocratic administrative board would be endowed with the arbitrary power of artificially apportioning the trade of the country between such places as it should determine. We do not think that such a body as the Interstate Commerce Commission should be permitted to assume the power arbitrarily to so apportion the trade of the country to nullify natural and acquired advantages in one locality and confer the favors of trade and commerce upon other localities by their dictum. This is precisely what they have done in at least one case and what they attempted to do in another against New York. In the decision of the Interstate Commerce Commission, filed April 30, 1898, in the case of the New York Produce

Exchange v. The Baltimore and Ohio Railroad and other lines, being a determination in the question of differentials existing against New York (Interstate Commerce Reports, Vol. VII, pp. 669 and 670), the Commission among other things said:

"In 1882 about 65 per cent of all the exports from the United States exported through the Atlantic and Gulf ports passed through the port of New York. The same year 80 per cent of all the imports into the United States by way of these same ports came in at the port of New York. It will be seen, therefore, that during that year, being the year when the advisory commission pronounced upon the reasonableness of these differentials, New York practically engrossed the foreign trade of this country. A preliminary question is, How far is the port of New York entitled, or how far can that port expect to continue, to enjoy that commercial supremacy?"

"Plainly not to the same extent. It would be in accordance neither with the theory of our institutions nor with the history of the development of our nation to permit any one port upon our vast extent of seacoast to monopolize the trade with foreign nations."

Then the Commission stated the various sums of money Congress had appropriated for the improvement of the several Atlantic and Gulf ports, and they concluded the paragraph with the following declaration:

"Rather does this recognize it as the policy of our Government that its foreign commerce should be distributed between various ports."

Actuated by this revolutionary sentiment, the Commission dismissed the complaint of New York and sustained the differentials. It is not necessary here to enlarge upon the injury that by these differentials has been done to our city. They have been the subject of repeated investigation and report by this and other organizations in this city and by official commissions.

In like manner the Commission in the Maximum Rate case assumed to adjust "the relation of rates" then existing between Chicago and the South and New York and the South. The complaint in this latter case was made by the Chicago and Cincinnati freight bureaus that rates to the South from those points were not "in just relation" to rates from New York to the same southern points. The Commission in this case, acting upon the principle enunciated by them and quoted above, ruled against New York and ordered an adjustment of rates which would give Chicago jobbers a better chance to take from New York her southern trade. This being the most important case in which the Commission attempted to exercise this power, it was appealed to the United States Supreme Court, and the action of the Commission was made void and the power of the Commission denied. Thereupon, the Quarles-Cooper bill was drafted. The geographical area from whence this bill gets its chief support is clearly defined.

But here again comes in the United States Constitution, exhibiting the wisdom of the fathers and rescuing us, as it assuredly will, from this great wrong. Section 9 of Article I provides:

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

There are still other features of the interstate commerce question, a consideration of which would further reveal the inadequacy of the Quarles-Cooper bill. Among these the question of making and changing the classification has the highest rank in importance. It is of but little practical consequence to the railroads who fixes the tariff rate if they retain the power to change the classification at pleasure. It matters little if prohibition of discriminating rates be enforced as between localities if classifications in those localities be not uniform. If the classification upon a manufactured product from western points to New York be sixth class and the eastern classification makes the same article third class going from New York, we are hopelessly discriminated against, and the Quarles-Cooper bill would give no relief.

It is needless to enlarge upon this feature. Almost every branch of business in New York has suffered grievous injury from this form of discrimination through the making of the classification. The Quarles-Cooper bill affords no relief for this evil.

It was the consideration of these and other important shortcomings and manifest weaknesses of the Quarles-Cooper bill that determined your committee to oppose its passage.

Not only does it fail to do many things that should be done, and does nothing in our judgment desirable that is not already provided for by the existing law, but it in so many ways seems to run counter to constitutional provisions that it would almost certainly become void after the first litigation under it had reached the Supreme Court of the United States. Therefore we have preferred to wait for a better bill, and the policy of this committee and of this board has been to oppose this measure as not only a useless, but, in some respects, a pernicious one, hoping that the grow-

ing sentiment throughout the country and in Congress, and a more perfect and thorough study of all the questions involved shall develop a measure whose provisions and scope will be just, ample, and broad enough to meet the needs of the whole country and repair in every respect, as far as practicable, the faults and weaknesses found to exist in the present laws.

Holding these views, we welcome most cordially the recent courageous and patriotic utterances of President Roosevelt and the renewed and intelligent discussion of the question he has thus precipitated. We are confident that this country is now upon the right track, and that the near future will bring about the enactment of wise and sound laws. To this end we observe that the President, after mature deliberation, has invoked the aid of the distinguished Judge Grosscup, of Illinois, and enlisted his services to draft a new bill to meet the demands of the situation.

We further note that the Hon. Paul Morton, Secretary of the Navy, a man of broad views and possessing a personal and expert knowledge of railroad problems, gained by a lifetime's association with and practical knowledge of the transportation department of railroad management, has, at the President's request, undertaken to assist in bringing about proper legislation.

Attorney-General Moody and former Attorney-General Knox, now a United States Senator, are also in the counsels of the President with special reference to this matter.

The appropriate committees of the United States Senate and of the House of Representatives have also taken up the subject with renewed activity.

In addition to this a proposition has been made, and meets with much favor, to appoint a joint special commission on interstate commerce to thoroughly investigate all problems involved, to take testimony during the long recess after the adjournment of the present Congress, and to report their conclusions and recommendations by bill at the opening of the next Congress, as was done in the last session of Congress with the merchant marine question.

With all these elaborate plans in preparation under the guidance of President Roosevelt, we believe that it would be very unwise and a serious error to take action at this time in behalf of the Quarles-Cooper bill, the enactment of which by this Congress would, beyond doubt, be used as an excuse for indefinite delay of the more comprehensive legislation which we may believe will come out of the pending discussion. Never in the history of this country has this cause had, to the same extent, the advantage it now derives from the attention and study of the President and the wise men associated with him. If, therefore, the Quarles-Cooper bill should be enacted with all its faults and weaknesses, and clothed in doubt, as it is, of the constitutionality of some of its provisions, and by its enactment the present aroused sentiment of the country should be so quieted that these efforts should cease, we believe it would be most unfortunate and delay the final solution of the problem for many years.

We also point to these conferences and preparations as suggesting a broader interpretation of the President's utterances than has been given to them by the friends of the Quarles-Cooper bill. We have interpreted the President's language to mean substantially that the existing laws must be enforced with reference to discriminations and rebates and other forms of preference in interstate commerce, and that if existing law is found inadequate to remedy these evils, additional legislation must be enacted. We indorse most heartily this sentiment.

In conclusion, we recommend that no action be taken at this time except that your committee be directed to promote as far as it can the necessary action by Congress to secure the appointment of a special commission on interstate commerce or such other plan as will bring about action in substantial harmony with the views expressed in this report.

Respectfully submitted.

W. H. PARSONS, *Chairman*.  
IRVING R. FISHER,  
J. FREDK. ACKERMAN,  
CHARLES A. MOORE,  
DICK S. RAMSAY,  
W. S. ARMSTRONG,  
THOMAS P. COOK,

*Committee on Railway Transportation.*

A true copy.

OSCAR S. STRAUS, *President*.

Attest:  
{SEAL.}

FRANK S. GARDNER, *Secretary*.

Mr. SMITH. Now, will the committee permit me to say just a few words of my own in this matter, if they have time?

The CHAIRMAN. We have not the time.

Mr. SMITH. Then I will merely submit a paper handed me this morning by Mr. Thurber, who received it from the Museum of Philadelphia, prepared by them, which gives the rates of freight of the principal countries of the world that have railroad transportation, and I would like to submit that with this.

The CHAIRMAN. Very well.

Mr. DAVEY. May I file a resolution of the board of directors of the Receivers and Shippers' Association of Cincinnati?

The CHAIRMAN. Yes, sir.

The paper referred to is as follows:

*Resolution unanimously adopted by the board of directors of the Receivers and Shippers' Association of Cincinnati on December 22, 1904.*

Whereas the item of transportation vitally affects every line of business; and

Whereas the factor of competition among the carriers is now in process of elimination under the community-of-interests idea; and

Whereas reasonable, equitable, and stable freight rates are absolutely essential for the fullest development of legitimate business enterprises of the country; and

Whereas the common carriers and the people are so interdependent upon each other as to make their interests in the transportation problem mutual; and

Whereas by virtue of this mutuality of interests, it is essential that the question of regulation of common carriers by the National Government should be dealt with in a broad and intelligent manner and in a spirit of absolute justness and fairness to all interests: Therefore be it

*Resolved by this association,* That in view of the public character of the business of common carriers, it is but fair to the people and also to the carriers themselves that the national Government should reasonably and conservatively regulate the transportation charges of common carriers so as to avoid discrimination between individuals, localities, and communities. And that this association favors a minimum amount of national legislation, which will not unfairly prevent the legitimate development of railroads as servants of the people, yet of sufficient potency to amply protect the shipping public from unjust and unreasonable rates, rules, and regulations, and to secure absolute justness and fairness as between the shipping public and the carriers; and be it further

*Resolved,* That this association strongly commends the recommendations made by President Roosevelt in his message in dealing with the great transportation problem; and be it further

*Resolved,* That this association favors the passage of the Quarles-Cooper bill, now pending in Congress, with an amendment to section 8 of the act to regulate commerce, as amended, that shall provide that in the event of rebates or discriminations of any kind whatever by the transportation companies the minimum measure of damages shall be the difference between the special rates and the tariff rates charged the shippers seeking redress; and be it further

*Resolved,* That a copy of these resolutions be sent to the President and to members of Congress.

Mr. TOWNSEND. Is this organization, represented by Mr. Smith, the same one that Mr. Thurber represented when he appeared before us?

Mr. MANN. Not at all.

Mr. TOWNSEND. Is this organization represented by Mr. Thurber?

Mr. SMITH. Not at all. His organization is the export organization; ours is the New York Board of Trade and Transportation, which has existed for a great many years, and, we believe, has done a great deal of good.

Mr. LAMAR. Mr. Chairman, I would like to present Mr. Burr, of Florida, a member of the railroad commission of that State, who will define his position before the committee.

The CHAIRMAN. You are recognized for ten minutes, Mr. Burr.

**STATEMENT OF MR. R. HUDSON BURR.**

Mr. Chairman, the committee that comes here to-day was appointed by the president of the National Association of Railway Commissioners, comprising 30 States that have commissions in this country, pursuant to the following resolution passed at their last annual convention:

Whereas provisions of existing laws do not adequately authorize and empower the Interstate Commerce Commission to properly correct and prevent unjust discriminations against persons and places, and enforce fair and reasonable interstate railway rates and charges: Therefore be it

*Resolved by the National Association of Railway Commissioners in convention assembled at Birmingham, Ala, this 16th day of November, 1904, That in accordance with previous recommendations the Congress of the United States be, and is hereby, requested to so amend the existing law as to authorize the Interstate Commerce Commission, on complaint that any interstate rate is unreasonable or unjust, and after full hearing, to ascertain what rate is reasonable and just in the particular case and order the carrier to observe that rate for the future, subject to rehearing upon application of the carrier when the conditions may have changed, the rate so prescribed to be effective unless enjoined by the court; and be it further*

*Resolved, That the president of this convention appoint a committee of nine to go before the proper committees of Congress and urge the passage of this needed legislation, and that each Senator and Representative in Congress be furnished by the secretary with a copy of these resolutions.*

We do not propose to burden this committee to-day with statistics, because we believe that you have already been furnished with sufficient in that direction. But I feel safe in saying that there is no set of men dealing with this question in the United States who are more familiar with the demands for such legislation, that come in contact with it daily in the several States, and that realize more fully the public necessity and public demand for legislation on this question. Fully 75 per cent of the commerce of the United States is interested, and while it runs in some States to 90 and 95 per cent, we believe, after investigating this question, that it will average 75 per cent in the United States. This amount of our commerce, as you know, goes entirely without regulation, and the rates are made by the railroads themselves. Many of these rates are fair; a great many of them are unreasonable. There is one particular measure that I want to call your attention to, that in whatever measure is settled upon we would like to have secured, and that is a provision that will correct the abuses of the long and short haul. Unless we get that, much may be left undone.

Mr. TOWNSEND. Would not the power to fix rates regulate that?

Mr. BURR. I am not certain that it would. Some commissions to-day have the power to make rates, and yet they can not always correct the abuses of the long and short haul. For instance, in my State, on trains moving from the West—from western points without the State; take, for instance, the through rate from points in Oregon to the base point in Florida—I will say Jacksonville, as that is our principal base point—and to intermediate points the rate is the through rate to Jacksonville plus the local rate from Jacksonville back to that point, although they do not perform the service. As an illustration, on a certain class of freight moving from a western point to Tallahassee, which is 165 miles farther west, or nearer the point of origin, the rate to Jacksonville is \$1. The local rate is 75 cents, and that 75 cents is added to the through rate to determine the rate to Tallahassee, although Tallahassee is 165

miles near the market. Now, we claim that that is a discrimination against all the stations between Tallahassee and the base point.

For instance, a station 25 miles west of Jacksonville, the same principle would apply there; the through rate, plus the local rate, would be the rate there. But the local rate would be a much less local than the one Tallahassee would pay.

Mr. LOVERING. That is on the same line of road?

Mr. BURR. Yes. That applies in several directions in the rate, but I used that as illustrating the whole, so that the freights to all these intermediate points are not on the same footing. A point nearer the base point, where the railroad actually hauls the freight farther, gets a less rate than Tallahassee.

The CHAIRMAN. Is there a statute now existing that would remedy that?

Mr. BURR. It was supposed to be remedied in the act to regulate commerce, but it has been held that it will not hold.

The CHAIRMAN. Why will it not hold?

Mr. BURR. I can not explain that particular feature of it, and will leave that to another member who will address you.

The CHAIRMAN. It is because that provision of the statute has been suspended in its operation by the Interstate Commerce Commission, has it not, in the particular case you speak of?

Mr. BURR. The Interstate Commerce Commission has decided, I believe, that they can not regulate that matter.

Mr. MANN. Did they not regulate it in the Social Circle case, and was not that case sustained by the Supreme Court of the United States?

Mr. BURR. I am not prepared to say, sir. But this condition that I speak of they have assured me that they can not correct.

The CHAIRMAN. What is the reason that they can not correct it? Is it because of the inadequacy of the law, or some other reason?

Mr. BURR. That is my understanding, sir; that is my understanding, and we feel that whatever legislation Congress passes, that particular feature of it ought to be remedied.

The CHAIRMAN. What suggestion have you to make as to change of the phraseology of the present law?

Mr. BURR. We have not undertaken to say to you, gentlemen, what particular law you shall pass, nor do we advocate the passage of any particular pending bill. We simply take the broad position that we need legislation on this question.

Mr. MANN. Might I ask you whether you believe that the law ought absolutely to forbid in all cases a greater charge for the shorter distance than for a longer distance?

Mr. BURR. No, sir. There are conditions where water competition at the base points would necessarily make the long haul a very much lower rate, and we do not pretend to say that in all cases the rate should be made strictly on mileage basis in that particular; but we do believe that the through rate, or very little addition to the through rate, would be the fair rate to intermediate points.

The CHAIRMAN. Let me call your attention to this section 4 of the interstate-commerce act:

That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same

line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

The difficulty that you complain of is because the road in that particular case has been exempted from the operation of that act. Is not that the fact?

Mr. BURR. I do not think it is. I do not think they have ever attempted to regulate it at all.

The CHAIRMAN. You do not think they have?

Mr. BURR. Now, Mr. Chairman, one of my colleagues has just mentioned to me that the Supreme Court has not upheld the action of the Interstate Commerce Commission in the Social Circle case.

Mr. MANN. The Supreme Court did uphold the Interstate Commerce Commission in the Social Circle case in that particular.

Mr. BURR. I will leave that point to Mr. McChord, who will follow me.

The CHAIRMAN. All right, sir.

Mr. BURR. I simply want to reiterate that we get complaints in the various States from shippers and receivers of freight calling attention to the freight charges, the abuses that they suffer, and in nine-tenths of these cases we have to try to explain to these people that this is a condition that we can not meet, because it is interstate commerce. Then, when that explanation is made to them, we invariably hear from them again making demand that we do all we can to get Congress to empower the Interstate Commerce Commission sufficiently to regulate these matters. And, while you do not have a unanimous demand upon you for this legislation to-day, I believe that fully nine-tenths of the people in the country want it and are in a position now to go to demanding it.

I will leave the further discussion to the other members who will follow me.

#### STATEMENT OF CHARLES F. STAPLES.

Mr. Chairman and gentlemen of the committee, appreciating the importance of time, and realizing that you desire all preliminaries waived, I last night endeavored to jot down memoranda of my thoughts upon this question, which will be a guide to me and will be the foundation for my remarks. I have not them in full, but with your permission I wish to read the matter.

Mr. BURKE. Please state who you are and where you are from.

Mr. STAPLES. I am a member of what we term the railroad and warehouse commission of the State of Minnesota, and have been for years; and in order to protect and shield myself I want to say to you gentlemen of the committee that I am not an attorney, and therefore can not be expected to answer all the legal and technical questions which you might propound.

Mr. MANN. That will be some relief.

Mr. STAPLES. Yes. I will try, however, to treat the question from



a practical standpoint, and wish to say that while these views may be personal, to an extent, they are representative of the consensus of opinion of the commissioners of the several States of the Union which meet every year to consider this, with other kindred questions.

We find to-day that the unification of railway interests has progressed to such an extent, through actual consolidation, control of stock in previously competing lines, the evolution of stockholding interests, more often called unity of interest, that the open competition between carriers which has previously operated to keep down rates, and certainly prevented wholesale increases in rates, has been very largely suppressed. These conditions being no longer factors, we can not rely on them for the control of the rate question. It is impossible to compel competition by legislation. Very naturally, competition springs from self-interest, and results only from the independent activities of those engaged in trade and commerce. It follows, therefore, that without effective competition in railway rates, and with no effective law for public control, the public is really defenseless, and must submit to conditions often manifestly unfair. We believe most conservative and thoughtful men will agree that the railway companies could not live and prosper under the old method of open, active competition, which only results in a demoralized condition of the rate question.

I want to say here that I am one of those who believe firmly—and the public generally do not coincide with that view—that actual, open competition in the way of making rates among railroad companies is an absolute impossibility. We could not live under that system to-day, in my judgment.

Mr. MANN. Because it would reduce rates too low?

Mr. STAPLES. It would result in what I term a demoralized condition. The companies, we will all agree, are entitled to a fair earning upon their legitimate investments, and we all want them to have it.

Mr. MANN. Active competition, in your judgment, would reduce railroad rates so low that the railroads could not afford it?

Mr. STAPLES. It would have that tendency at times, and in certain localities; there is no doubt of it. If that was the real motive, that of securing their share of the traffic, they would have to resort to that which I have described. As I say, I appreciate that the public generally clamor for open competition among railroad companies, with the object in view of reducing rates. What we want is such legislation as will authorize some public body to act as arbitrators between transportation companies and their patrons, thereby securing them against excessive or unfair charges or discriminating practices in the movement of commerce between States and the giving of shippers and localities an equal system of rates, which shall be fair to the shippers and remunerative to the railroad companies.

The chief complaint now is that the transportation companies are the sole arbiters as to what is reasonable treatment. The inadequacy of making rate regulations dependent upon rates as applied in the past, without reference to rates to prevail in the future, is surely apparent to all. The real parties to suffer are left without remedy.

And here I want to say, Mr. Chairman and gentlemen, that in my opinion it is just as necessary in the matter of public control that there should be some tribunal who may act as intermediaries between the patrons and the roads, and shall have just the same power, and

there is just the same necessity for raising a rate as there is for lowering rates, or prescribing what is a fair and reasonable rate. There are many times, in my judgment, when rates should be raised; and I have, as commissioner of our State, participated with our board in directing certain railroads to raise certain rates when rates should be raised. There were times when it seemed to be the only means of affording fair relationship between different localities.

Mr. BURKE. Has the authority of your commission to raise a rate ever been determined in your State? Has that question ever been determined as to whether you had that power?

Mr. STAPLES. No, sir; I do not wish to say that it has.

Mr. WANGER. Has the action been acquiesced in by the railroad companies and patrons?

Mr. STAPLES. Yes, sir. And I want to say at this juncture that in the State of Minnesota the powers of the commission are very broad, perhaps as broad as the powers of the commission in any State in the Union, and I think it is fair to say that the relation between the railways and the commission has been rather harmonious on the whole.

Under the ruling of the court the Government is gradually losing control, and the tendency has been for the management of the companies to centralize. Weak companies have been obliged to go out of business, or have been absorbed by the larger ones or the stronger ones. So that at the present time no one disputes that the great share of the mileage is controlled by very few men. These men naturally represent the interests of the stockholders. Can we look for them at the same time to be philanthropists? If rates and conditions in different localities are reasonable, surely the railroad man should not fear investigation by any impartial tribunal. I do not believe that any tribunal vested with the power to arbitrate between the carrier and the shipper, and appreciating all the responsibility placed upon them, after hearing all the testimony on both sides, would do otherwise than render a fair decision. Surely such a body, composed of intelligent men, is as competent to pass upon a question as are railway officials. That position may of course be disputed, but it is based upon my contact with railway officials.

Rate making at best is an arbitrary matter. I never yet heard any traffic man say anything else. The chief effort is all the time to approximate what share of the whole burden of transportation shall a particular traffic stand, one of the most difficult problems possible, and, as I say, finally the decision is an arbitrary one, and necessarily so, for there is no scientific method of determining what share it should stand nor the actual cost of transportation of any particular commodity. I think the record will show that in most cases the complaints are of discrimination or unfair relation of rates rather than of rates being too high. And surely it will be conceded that such questions should be submitted to some intermediate body to pass upon, and not leave the shippers or locality solely to the mercy of interested parties.

Take, for instance, Chicago and St. Paul, or as was stated here this morning, New York and Philadelphia, competing for common markets in the West; one of those places has the rate prescribed at one point which gives it a slight advantage over the other. Should that question be left solely to the railway companies, or should there be some intermediate body to step in and say that that is an unfair relation?

I do not claim there that the question is involved as to whether a rate is too high or not. It is the relationship that I am speaking of; the foundation for the complaint. It being so manifest to all that public sentiment is so strongly crystalized in favor of such legislation as would restore to the Interstate Commerce Commission the powers supposed to have been conferred by the law of 1887, it seems only fair to ask you, gentlemen of the committee, to recommend such a law, and have it enacted, and let time tell whether this will solve this great question.

The CHAIRMAN. Would it interrupt you if I were to ask you a question?

Mr. STAPLES. I would be pleased to answer, if I can, Mr. Chairman.

The CHAIRMAN. Speaking on that subject of differentials between localities, imagine the condition that existed a few years ago, when the Pennsylvania road had its line to the west from Philadelphia, and the Baltimore and Ohio had its line to the west from Baltimore, and neither had a line between Baltimore and Philadelphia. Suppose that the Baltimore and Ohio Railroad gives to its terminal, Baltimore, an advantage of 2 or 3 or 4 cents; do you think that that would be a proper subject for governmental interference, or for the Commission to act upon? Would not the people of Baltimore have the right to whatever benefit a road coming to their place, and not going to its rival, would give them?

Mr. STAPLES. I will give you my honest opinion about it.

The CHAIRMAN. I want to get your idea about it.

Mr. STAPLES. Yes, sir. I do think, without going into details, that there should be an intermediary tribunal for the purpose of passing upon that question; a tribunal which is disinterested and has the interests of the whole public at heart.

The CHAIRMAN. You think those two rates should be the same?

Mr. STAPLES. Do not understand me to say that. There may be reasons why there should be a difference. But I do not believe that the question should be solely settled by those different companies.

The CHAIRMAN. Then, you think that it would be proper for the Government to provide means by which the rate to Baltimore should be raised, and they lose the advantage that comes to them from this situation that I have described?

Mr. STAPLES. I do. However, upon that question I wish to say that while there might be a case parallel to the one you cite, under the conditions to-day, such cases are rare.

The CHAIRMAN. I was speaking of the conditions that existed.

Mr. STAPLES. I understand that.

Mr. MANN. The condition does exist to-day, in Iowa points, in shipping grain that goes to Liverpool as to whether it shall go to Galveston or to the South, or whether it shall go to New York coming east. That is a practical condition to-day, is it not?

Mr. STAPLES. Yes, sir; that is true. I agree with you there.

Mr. MANN. Do you think that it is wise to confer upon a commission the power to set aside all rivalry in trade and by an arbitrary order determine that the grain shipments to Galveston shall cease, on the one hand, possibly, or that the grain shipments to New York shall cease, on the other hand, possibly?

Mr. STAPLES. Yes, sir. And as a qualification I wish to say that I

do not believe that a commission would so find under any circumstances. They might, however, find that there should be a certain change in the conditions.

Mr. MANN. Do you believe that it is within the power of finite wisdom, in an order, in a specific case, and upon a hearing, to absolutely determine between these two points, Galveston and New York, say, so as to reach absolute equality that must remain, instead of leaving it to a question of rivalry?

Mr. STAPLES. There can be no such conclusion on the question; under our constitution—getting a little way into law, as I understand it now—that is absolutely precluded, as I understand. There can be no decision by any commission which is final or which is not subject to review by a court.

Mr. MANN. I mean assuming that the courts would review it and come to the same opinion. Assuming all that.

Mr. STAPLES. I reiterate my opinion; restate it—that these different common carriers being public servants you can not present to me a feature or a question which would change my opinion that there should be some supervisory power.

Mr. ADAMSON. Do you not think that a better plan would be that where the railroads are willing to compete they should be allowed liberty to do so, and where they desire to throttle competition and combine on rates that then the intermediate power should take a hand and set that right?

Mr. STAPLES. The railroad companies in certain conditions desire to compete, as you put it, but the cases are rare where, for any length of time, they dare do it. They can not do it and live. If they do it, they will kill each other off.

Mr. ADAMSON. That would be because they cut one another's throats?

Mr. STAPLES. Yes, sir. Now, speaking of the Elkins law which has been enacted, I think it was wise legislation. I have not any doubt in my mind that it was enacted as much, and perhaps more, to benefit the railway companies of the country than the people of the country. Yet I think there is a common benefit, and I think that was very desirable and necessary legislation. I am not able to prove anything, and am making no charges, but it is claimed that that law is evaded to-day in certain localities and by certain railroad companies. I do not make any charges, but it is so stated by persons who claim that they can prove it.

But it is a benefit to the country by preventing this demoralization of the railway situation, and certainly must have added very greatly to the revenues of the railroads of the country, as it has obviated the necessity of refunding to certain favored shippers those charges which properly belong to the carrier, which demoralization would simply result in discriminations between certain individuals or favored localities on the lines. I think this law has in a great measure done away with that, and has been a good thing.

Mr. MANN. You are a practical man, and your views are of great value to us, and you will pardon me if I ask you another question.

Mr. STAPLES. You appreciate that I wish to take up as little time as you wish me to take up.

Mr. MANN. I understand. It is claimed, now, by both Chicago and

New York, that the grain rates from Iowa points through Chicago and New York to Liverpool are too high as compared with the rates from Iowa points to New Orleans or Galveston on the way to Liverpool. Do you think it is wise to permit the Interstate Commerce Commission, after hearing, to raise the grain rates from Iowa points to Galveston and New Orleans, and prevent the railroads now leading south from getting what they consider is their share of that grain trade, and helping those southern ports at the same time?

Mr. STAPLES. I think this, that there is more than the question of grain rates involved in that question. Those roads running south are operated to serve the public. It may work no injustice to the producer of grain in our Western and Northwestern States if that rate shall be raised, thereby enabling them to get a share of that traffic and to have that to help support them in rendering the other necessary service to the communities served by them. As I say, I can only reiterate my opinion. I do not wish to stand here as an advocate of the principle, generally speaking, of the raising of railroad rates.

Mr. MANN. We understand that.

Mr. STAPLES. Not at all; and I believe that power should be conferred upon the Commission. I say "the Commission." I mean any tribunal.

Mr. MANN. I understand. You base your answer upon the proposition that the raising of the grain rates to the South might possibly reduce rates on something else, because it would add to the income?

Mr. STAPLES. No, sir; not at all. That answer was based on the principle that they ought to have a share of that traffic if they are in a position to carry it.

Mr. MANN. I base my question upon the proposition that the Interstate Commerce Commission might, within its power, raise the grain rates South so that the roads South would lose that business. I do not think any of the grain ought to go South. It is a longer way round; and the Interstate Commerce Commission might entertain that same view. But the question is whether they ought to have the power to put it into effect.

Mr. STAPLES. We have in our State to-day a law the wording of which is slightly different from the wording of section 4 of the interstate-commerce act. Our law is effective on the question of the long and short haul. Under that law it is left arbitrarily subject to the review of the courts, with our permission, to determine when that clause may be abrogated by the company. They universally apply to the commission for permission to waive that at certain common points. Now, it rests with us to say whether the question of competition which enters and whether the volume of business they would get at that point are such that in our opinion they should be permitted to lower the rates at that common point on their line because of the fact that their line may be one-third longer than the other line. That answers that question.

Mr. ADAMSON. Do you think it would be right, without the consent and contrary to the judgment of a carrier, to raise a rate that carrier thought was fair and profitable and which it was willing to operate?

Mr. STAPLES. I do not think it is fair to take it from that standpoint. You can not determine whether the carrier thinks it is fair and profitable or not. They may have another motive.

Mr. ADAMSON. That is not the case I state.

Mr. STAPLES. Yes; they may have another motive.

Mr. ADAMSON. That is not the case that I state. The case I state is that of a rate which a carrier thinks is fair and finds profitable and which it is willing to operate under. Is it right to raise that rate against the judgment and consent of that carrier?

Mr. STAPLES. There may be conditions existing why, in my opinion, it would be fair.

Mr. ADAMSON. You think that if a carrier finds that it is downhill to New Orleans, and that it can haul twice as much, and can get better loading back, and that other conditions combined will enable it to haul cheaper to New Orleans from the grain fields of the West than from those grain fields to New York, it would be right for the Commission to annul natural conditions and rob that carrier of its market, rob that road and that city of its business, to give it to somebody else, do you?

Mr. STAPLES. I think there might be conditions where that would be a wise policy. I do not think it often occurs.

Mr. ADAMSON. It would be entirely for the benefit of another fellow that it would be wise, though, would it not?

Mr. STAPLES. No, sir; not in my judgment, not at all.

The CHAIRMAN. A little while ago, in answer to Mr. Mann, when you were discussing the contention between Chicago and Gulf ports, you said, as I understood you, that those people, the Chicago people, would have a right to some part of that traffic?

Mr. STAPLES. I spoke of common western points, between Chicago and St. Louis.

The CHAIRMAN. I thought the contention came from Chicago.

Mr. STAPLES. No, sir.

The CHAIRMAN. As a matter of fact, it does.

Mr. STAPLES. It was a misunderstanding.

The CHAIRMAN. It was a controversy between Chicago and those Gulf ports?

Mr. STAPLES. I had no reference to that in the connection you speak of now.

The CHAIRMAN. I did not understand you, then.

Mr. STAPLES. Proceeding, Mr. Chairman, we are not here to advocate any particular measure; but I wish to call attention to the so-called Quarles-Cooper bill, as it is generally claimed that this measure simply restores the same powers to the Interstate Commerce Commission which it was supposed to have under the former law. This, I think, is an erroneous idea. There seems to be but one question prominent in this discussion, and that is the question of granting power to make rates to an intermediate body. From my view, and so far as I have been able to read from the public press, that seems to be the prime contention here, and I wish to emphasize that, in my opinion, while that is a very necessary power to confer, I do not believe that it is the crying evil to-day; that is, that the chief complaint comes from the source of the rate, particularly.

It comes more from the inequalities of unfair conditions existing between different localities. And in that connection I wish to say that I have in mind somewhat the question of common markets, and also the question of the long and short haul clause or feature of it, as to which our courts have held, as I understand, as in one of the meas-

ures referred to here this morning, that that question of determining when competitive conditions are such that the long and short haul clause should be abrogated rests with the judgment of the carrier and not with the judgment of the Interstate Commerce Commission. The law is worded just slightly different from the law of my State, which has been tested and found to be good.

In that connection I want, at this juncture, to give an instance, and I want you gentlemen to consider—not to give your opinion to me but to consider—this instance. Taking the different stations—which I can name here—I have on my desk now, which of course we can not treat because it is interstate commerce, an instance where the railway company takes grain from intermediate points between the Twin Cities and Chicago for the shipper who offers it. The shipper pays the local freight into the Twin Cities; he pays the other freight back to Chicago and makes a half cent a bushel on the transaction. In other words, he saves a half a cent over what he would have to pay if they picked up a car on the road to Chicago. It seems to me that I can not find a clearer case of what to my mind is an unjust relation of rates. I simply ask the question, and ask you gentlemen to consider, whether such a situation as that should not be treated by some intermediary body. I do not say that they should have final authority, but the opinion should come in there as to whether those rates are fair.

Mr. MANN. That rate you named is made in the interests of Minneapolis flour, I suppose?

Mr. STAPLES. I am not here to make any but general statements. I simply cite that as an incident.

Mr. MANN. I understand.

Mr. STAPLES. And I could cite many of them, but I do not think it would be right to take up the time of this committee. I could cite other instances; for instance, where companies bringing cement and lime and other necessary commodities in—for instance, for the building of sidewalks—charge the through rate to St. Paul and the local rate back. Now, there may be reasons why that could be justified. There no doubt are, to my mind. But ordinarily I think that is exacting an unfair rate from the intermediate points.

The CHAIRMAN. Will you state, Mr. Staples, why that would not be a case that could be corrected under the long and short haul clause of the interstate commerce act?

Mr. STAPLES. For the very reasons that I have stated to you, Mr. Chairman. Understand, I make no pretenses to being a lawyer, but I have read those decisions, and it is made clear to my mind that the courts have held that the competitive conditions between the distributing and terminal points may be such that that is necessary.

But the point that I criticise or complain of is that the courts only hold that that is left to the opinion of the carriers. They are to be the judges. If you will read the decisions I am confident you will find that that is the finding of that court.

The CHAIRMAN. Then the remedy would be to strike out from section 4 this line: "Under substantially similar circumstances and conditons." Would you strike that out?

Mr. STAPLES. Mr. Chairman, I beg to be relieved from giving specific answers as to the wording or the substitution of words which would cover what I call the defect.

The CHAIRMAN. But, Mr. Staples, you are a man of large experience in this matter, and you are a public officer who has to deal with questions very similar to this, the only difference, perhaps, being that your subjects are State commerce and this question that I speak of applies to interstate commerce. The principle ought to be the same in each, and you must be familiar with that principle. Now, can you not aid us with your experience upon a question of this kind, as to whether that is the language that destroys the benefit of section 4?

Mr. STAPLES. Mr. Chairman, I can do this. I do not wish to presume, but I will say that I could and would cheerfully transmit to you a copy of our law, the wording of which has been upheld by the courts. I could not quote it to-day exactly, and I would not care to place myself in that position. I realize that a most grave question is at issue, and I would not attempt it. A man sometimes gets a word wrong, even in a prayer that he says every day. With all due respect, Mr. Chairman, I could not attempt to give you specific language. But certainly the point at issue I make clear, and I am certain if the committee will review the findings of the court they will agree with me. And to emphasize that, I want to say this: That the very cases, some of which I have spoken of here to-day, I have taken up with the Interstate Commerce Commission, and they have convinced me that they are absolutely powerless, excepting to make a recommendation, which the railway companies may observe and may not, just as they see fit. They are without the power to enforce their recommendations.

Mr. MANN. Perhaps I can aid you, and I am sure you can aid us, by two or three questions in sequence.

First, do you think that in no case should the railroad company be permitted to charge more for a shorter haul than for a longer haul?

Mr. STAPLES. I do not hold that at all.

Mr. MANN. Do you believe, then, that they ought not to be permitted in any case to do that unless they have consent, after application to some board or commission like the Interstate Commerce Commission?

Mr. STAPLES. Yes, sir; which of course carries with it what goes without saying, that it may be reviewed by the courts.

Mr. MANN. I assume that.

Mr. STAPLES. Yes, sir.

Mr. MANN. Now, do you think from your experience that there would be physical and mental capacity on the part of any one commission to settle all of those questions that would arise, together with the rate questions and other questions involved, under the present act to regulate commerce? Would there be time enough, I mean?

Mr. STAPLES. Well, that is a most difficult question to answer, and in answering it I want to say this, that as soon as the decisions of the Commission have been found to be reasonable they are obeyed.

I speak from experience in my own State. In 90 to 95 per cent of the cases where they take it up intelligently and hear the evidence on both sides their findings are brief, they are to the point, and they are observed by the carriers. I think I can say in more than 95 per cent of the cases. In a large share of the cases in our commission the experience has been that they do not even have to go through the formality of a hearing. If in conference with a representative of the company who is in touch with the commission they show a disposition to be fair, the point is often conceded without a hearing at all. It is



utterly impossible to say, for that reason, how much time might be consumed in these hearings. I can appreciate that the draft on the time of the commission in the first four or five years would be enormous, because the complaints might overwhelm the commission. But that would not alarm me; I do not think it is an alarming feature.

It may be necessary. I am not indorsing it, but I am in a position to say that our legislature is considering a measure this winter having for its object the authorizing of our commission to take up with the Interstate Commerce Commission these very questions, where complaints of the nature of the different ones which have been spoken of this morning might have to be treated, giving the commission authority to take up such cases with the Interstate Commerce Commission, with the idea that they are in a position to take them up intelligently, and providing that the State should bear the expense, and with the idea that less time would be consumed, of course, to the end that this commission would be largely relieved by being somewhat advised of the facts, and it would necessarily take much less of their time.

I simply speak of that to bring out the fact that in my opinion the time is coming when the Interstate Commerce Commission, through its agents or through some system of reorganization, will act in some such way as that, assuming that this power of public control will be conferred in the end,—that there will be a relation between State commissions, or that there may be district commissioners, or some other system may be established whereby the central power would be relieved of a share of the detail work. That is a general idea on which I have thought more or less; but I can not answer your question specifically. I have expended a good many words in endeavoring to answer it, as you see.

MR. MANN. You have said a great deal that is of value to us. Now, another question.

You have spoken of deciding these questions without a hearing. Do you think that the Interstate Commerce Commission ought to have authority to relieve the carrier from the long and short haul clause without a hearing?

MR. STAPLES. I think you must have misunderstood those words before, used in connection with the statement that it was by conference with the railway companies, and a harmonious agreement.

MR. MANN. I mean without a hearing of the parties?

MR. STAPLES. No, sir; I do not entertain that idea for one moment—that the railway companies, particularly, should be denied every opportunity to present every phase of the case from their standpoint.

I want to say in that connection that I emphasize this statement—that there can be no question that the Interstate Commerce Commission, if that is to be the tribunal, after having experience and being composed of the men that it should be composed of, is far better able to pass upon these questions than any court in the land.

Some one has asked, Why not let the court make these rates? The court is a very intelligent body, but it has to deal with thousands of questions and issues, and has no particular training along this line, and with all due respect to the court, they are not competent, in my opinion, excepting to review the question and determine whether some illegal act has been performed by the Commission, or some act which in itself is unreasonable or which would result in an unreasonable finding.

Mr. MANN. Could you give us any idea of the number of findings of the Commission, in your State relieving the railroads from the long and short haul clause?

Mr. STAPLES. Yes; very quickly. There has never been one?

Mr. MANN. There is no place in your State where a carrier is permitted in local traffic within the State to charge more for a short haul than a long haul?

Mr. STAPLES. Not one. And I want to say in that connection that there have been many applications.

Mr. LAMAR. I would like to ask the witness a question.

The CHAIRMAN. Certainly.

Mr. LAMAR. The proposition to invest some administrative or ministerial body, or whatever it might be termed, with the legislative power to review rates and fix a rate, upon hearing, to be reasonable, which up to that time had been challenged, is looked upon, of course—and it is not disguised by those who have railway interests—with great alarm, and, I think, from their standpoint with very sincere alarm. They look upon the further proposition of the original rate-making power as being something almost satanic.

Now, the question I would like to ask you is this: If this administrative or ministerial body is given the right to review a particular rate and fix upon a rate to be reasonable, which up to that time had operated unjustly and unreasonably, in their opinion, can not every rate in the United States be challenged? I mean now logically, without reference to whether they do it or not?

Mr. STAPLES. I understand.

Mr. LAMAR. Can not every rate in operation be challenged by complaint, either by filing a complaint against that particular rate or—

Mr. STAPLES. I would have to answer that question in the affirmative.

Mr. LAMAR. That is what I have always thought. I have thought that it was a distinction without a difference.

Mr. STAPLES. I am only giving you my opinion. My judgment is, yes, to that.

Mr. LAMAR. I never have seen any use in arguing the proposition. It is either somebody humbugging himself or, more unfortunately, humbugging somebody else when a distinction is attempted to be drawn between the giving of a power to challenge the rate and fix it in a particular case and challenging every rate in the United States. Continuing it logically, they would have the same power in the one case as in the other. Now, whether they would do it or not is another question. I have no idea that they would. I tell you frankly that if I were to vote for a bill that gave this administrative body a right to challenge a particular rate and fix it upon hearing, I would just as lief go the length and give it the entire power, because logically I think it is the same. Now, whether or not the Commission vested with power to fix rates would any more think of disturbing the business of the country and go to the extent of interfering with existing railroad rates in any such manner as that is another question. I do not think they really would.

Mr. STAPLES. Nor do I.

Mr. LAMAR. And I think there will be enough to convince the public in the challenging of rates, so that whether they have the original rate-making power or not, the result will be about the same.

Mr. STAPLES. No; I could not agree with you on that.

Mr. LAMAR. No? Still, logically—

Mr. STAPLES. The probabilities and the possibilities are two very different things. Now, I am answering that from my knowledge of the question in issue.

I want to add that in the State of Minnesota, under the powers of the Commission, on their initiative they are authorized to challenge a rate—any rate or all rates—without petition. Of course there is no such purpose, or at least it has not been advocated here, except on petition; and it is not the Commission in this instance who challenge the rates; it is the petitioners. And judging from the result in my State, where the petitioners may challenge a rate, experience has shown me—and I have learned that the same idea prevails in most of the States—the shippers are very slow to make their grievances public. They hesitate a long time to do it. I am not here to set out the reasons why; but these reasons are what has prompted the legislature of the State of Minnesota to confer upon the Commission the power to initiate, by resolution, the question of the reasonableness of any rate. That is what prompted our legislature in our State to do that. Now, the Commission in our State, in exercising that power, are very discreet, if I may say so, and very careful and conservative, and the complaints by shippers or localities challenging rates are relatively few.

Mr. RICHARDSON. I understood you to say a few minutes ago that it would be safer and better to leave the Interstate Commerce Commission, with their experience, with power to regulate and fix a rate than it would be to confer that power upon a court composed of judges?

Mr. STAPLES. I answered that emphatically, and I said that was with all due respect to the court.

Mr. RICHARDSON. I understand that. Your opinion, then, is on this line, that while a man may be very able in law he may not be very practical in regulating railroad lines?

Mr. STAPLES. Exactly so.

Mr. RICHARDSON. And you would rather take the Interstate Commerce Commission, with the experience that they have now, and their qualifications, than to trust to a court of three or nine men, of lawyers, judges, men qualified in the law?

Mr. STAPLES. Yes, assuming, of course, that they are not especially appointed to do this work.

Mr. RICHARDSON. You assume that they know their business, and have studied and they may be learned in the law, but they are not as competent in these practical lines and in the matter of fixing rates as the Interstate Commerce Commission, who have had a great deal of experience in that way?

Mr. STAPLES. Yes, sir; and my experience has been, where we have had cases in the courts in our State, that the courts steer clear of all the questions except the legal ones.

Mr. RICHARDSON. We have had much talk about experts. Is it not the fact that generally there is no testimony more uncertain and in which there is more difference of opinion among the witnesses than expert testimony?

Mr. STAPLES. I will answer that question, and then I want to add a statement.

Mr. RICHARDSON. All right.

Mr. STAPLES. In any case where there was an issue which had to be tried by the court—

Mr. RICHARDSON. Yes.

Mr. STAPLES (continuing). I would rather rely on common sense and honest people than on experts.

Mr. RICHARDSON. You would rather rely on good men, practical men, in the practical affairs of life, to arrive at what is a practical conclusion in the practical affairs of life, than on a court? You would rather take an honest jury of men than five judges learned in the law?

Mr. STAPLES. Yes, sir; that is where the jury system excels.

I fail to find where power is conferred to require two or more companies to make and maintain joint rates, which is very necessary if full relief is to be granted.

Some claim the remedy for a party claiming a rate is unreasonably high lies in a suit for recovery of damages. This may be good theory, but mighty poor practice. In the event he can afford the cost of litigation he is liable to die before the courts have finally passed upon the question; but more likely if the rate complained of is an unreasonable one as compared with the rate given some competitor at another point, he is sure to be driven out of business before the case is determined. If the rate is an unreasonably high one and he continues to do business under it, he is not the real sufferer and should not recover. The real loss falls upon the producer who has been required to sell his product based on the high rate.

The shipper, usually the middleman, is not so much interested in the rate itself as he is in a fair rate from a competitive standpoint.

The cases are comparatively few where more than one rate is involved, or at most the rates on one commodity. In the event this rate is reduced by an order of the Commission and the order put in effect during a review by the courts, if the order is not sustained it seems reasonable the railway company can better stand the temporary loss in its revenue on this one product than the shipper can in case the order is sustained, pending which time he had been paying the higher rate.

We can not treat the transportation companies as private enterprises. They exercise the rights of eminent domain, and are organized under public franchises for the sole and only purpose of performing a public service for hire. Our courts have repeatedly held them to be subject to public control.

Can any one imagine the railway companies consenting to a law providing that the farmer shall have the final say as to what price is to be paid for his land needed for the right of way? This is simply changing the shoe over to the other foot.

No one to-day questions the necessity and wisdom of public control of public turnpikes, ferries, telephone, telegraph, and express companies, street-car companies, and even grain elevators, stock-yard companies, public carriages, etc. We do not stop at how they shall conduct their business, but arbitrarily prescribe their rates and charges. Is it not as much necessary to regulate and control under reasonable safeguards the business of these powerful but very necessary public servants as are railway companies?

In closing, gentlemen, permit me to say there is no feeling antagonistic to railways in the Northwest, and certainly no sentiment favoring national legislation which will in any degree act to cripple the legitimate growth and development of their properties; but there is a

well-grounded and strong demand for immediate legislation which shall grant reasonable Government control over interstate commerce.

The CHAIRMAN. We will give you an opportunity to continue your statement to-morrow morning, Mr. Staples.

Mr. STAPLES. I thank you very much.

Thereupon, at 12 o'clock m., the committee adjourned until to-morrow, Wednesday, January 18, 1905, at 10 o'clock a. m.

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WEDNESDAY, *January 18, 1905.*

The committee met at 10.30 o'clock a. m., Hon. William P. Hepburn in the chair.

The CHAIRMAN. Mr. Staples, we are ready to hear you further.

**STATEMENT OF MR. CHARLES F. STAPLES—Continued.**

Mr. STAPLES. Mr. Chairman and gentlemen, I will ask for just one minute, and not more. I regret very much that I could not finish my remarks yesterday. I have taken occasion to file an addition to them with your reporter.

I wish now just to emphasize three points which have been brought out in these remarks. In the Quarles-Cooper bill are the words "when a case has been referred to the courts and an appeal taken, a court may deny or modify the order." This is the point that I wish to make, Mr. Chairman. Under the decisions of our Supreme Court, when treating the question of rates, the courts can not modify the order of the Commission. They must affirm or deny, and that upon the ground whether the rate authorized by the Commission is a confiscatory rate or not. I am not here to cite those decisions of the court, which this committee can look up and consult.

I notice that a great deal of time has been spent upon that in the different bills that have been presented.

Another thing is, that I think any bill which is enacted should contain the provision that the findings of the Interstate Commerce Commission should be made *prima facie*, thereby making the railway company the defendant, rather than the Commission. That is a provision contained in the statute of Minnesota, and has been upheld by the courts and has been found to be very effective.

Another provision, Mr. Chairman, which seems to me to have been omitted or not taken care of in the so-called Quarles-Cooper bill, is one authorizing the Commission to insist upon the companies providing a through joint rate and maintaining the same. Without that authority they are not powerless, but a large share of the good which is hoped for from some legislation of this character will be denied.

Now, Mr. Chairman, I do not wish to elaborate upon those points, and will give the balance of the time to my associates.

Mr. BURKE. I would like to ask Mr. Staples one question, if I may be permitted.

The CHAIRMAN. Certainly; proceed.

Mr. BURKE. The newspapers report this morning that a member of the Minnesota legislature declined to vote for the reelection of Senator Clapp to the Senate because he had not declared himself in favor of the Quarles-Cooper bill, or that he had not declared himself soon enough. I would like to ask you if you are in favor of the Quarles-Cooper bill.

Mr. STAPLES. I am very sorry to be put in that attitude. However, my situation upon this necessary legislation must have been made clear to this committee. The Quarles-Cooper bill, in my opinion, will accomplish very little of what the public are clamoring for to-day; that is, in the way of strengthening the hands and powers of the Interstate Commerce Commission.

Mr. RICHARDSON. Mr. Chairman, one word. From indications, it seems to me that the hearings are going to close pretty soon, and I think there ought to be a fair division of time made. Now, we had one side pretty thoroughly represented here, and I do not think that the large number of railroad gentlemen who are interested in this matter have had an equally fair chance here. We are going to close pretty soon, and should we not have a fair understanding?

The CHAIRMAN. The situation is somewhat peculiar, because Mr. Bacon announced early that the proponents of the Cooper bill did not want any time.

Mr. RICHARDSON. I do not mean to reflect on the other side at all. I simply made the suggestion that we could reach some fair division of the time. I believe these hearings are going to close pretty soon.

The CHAIRMAN. We will have to limit you gentlemen this morning strictly to the time you said you wanted.

Mr. BURR. I believe I understood yesterday that the other members of our committee would consume twenty minutes.

The CHAIRMAN. Twenty minutes between them?

Mr. BURR. Yes, sir.

#### STATEMENT OF MR. C. C. M'CHORD.

Mr. McCHORD. Mr. Chairman and gentlemen: I, of course, do not know how wide a range this testimony has taken, but I apprehend that in the discussion of such a proposition as this there are three questions that should be determined. The first is the power of Congress to delegate the authority that it proposes to give the Interstate Commerce Commission.

The CHAIRMAN. I do not think there is any question about that. There is no member who is disturbed about that.

Mr. McCHORD. Yes, sir; I thought not. The next question is as to the necessity for such an amendment. The third question is as to the possibility of it. I mention the first proposition because in Kentucky we have in the last few years had a full discussion of the proposition, and an effort has been made there to pass a law giving the State railroad commission of that State the power to pass rates. That question was raised with a great deal of emphasis and seriousness, and it has gone to the extreme there that it is almost contended that the Constitution itself was unconstitutional. So far as I am concerned, I believe, and I believe that the people of this country—the masses and the shippers—believe in this legislation; that they are in favor of giving the Interstate Commerce Commission additional powers which it does not now possess. And in making that claim we do not desire to be understood as taking the position that all railroad rates and all tariffs made by the railroad corporations of this country are unjust or unreasonable. I believe, as a rule, in the main they are adjusted upon a fair and equitable basis. But it is the exception to the rule that we

want this Congress to cure by the amendment to the interstate commerce law.

Now, the question was propounded yesterday regarding the long and short haul section of the act. It is well known that in the Social Circle case there were two propositions, one as to whether the rate to Social Circle from Cincinnati—the differential on shipments from Cincinnati to Social Circle—of 50 cents was just and right; whether the circumstances and conditions that there prevailed justified that particular rate to Social Circle as against the rate of \$1.07 to Atlanta and Augusta. It is a question of fact that the Commission heard and determined, and it was not justified under the act. That question went to the Supreme Court of the United States, and that court held that the finding of the Commission was proper. The Commission in the same proceeding undertook to fix the maximum rate to Atlanta. The Supreme Court held in the same case that it was not within the power of the Commission to fix a maximum rate.

The Interstate Commerce Commission under that decision assumed that it had power to decide whether the circumstances and conditions surrounding the transportation of commodities to and from the various territories in the country were solely for their consideration, and in the case which followed, the Belma case, I believe, and then afterwards in the case of the Tennessee, Virginia and Georgia Railroad Company against the Commission, it was held that the law, the act itself, fixed the proposition that if there were dissimilar circumstances and conditions even as to competition between rail and rail, that that was a question which the carrier itself should consider, and which the law considered, and it was said that it was such a dissimilarity of circumstances and conditions as would justify the higher rate. Therefore, that being the state of the law, we do not think that any such discretion should be given to the carrier, nor do we think that that should be the law.

In Kentucky we had the same provision engrafted into our constitution as to the long and short haul. The railroad commission of Kentucky there refused to exonerate the railroad company from the provisions of that section on the shipment of coal from eastern Kentucky to the city of Louisville. We did that, not because we did not believe that there should be a less rate to Louisville where that coal came in competition with coal that was floated down the river on barges for something like 25 or 30 cents a ton, but we contended that the rate to the intermediate points was too high and should be reduced. The Kentucky court of appeals held that that was a matter purely in the discretion of the railroad commission and that the court could not interfere with that determination on the part of the railroad commission. That case came to the Supreme Court of the United States and was upheld, and it will be found in United States Statutes, volume 33, page 503, I believe.

The impression seems to prevail that tariffs and rates, so far as interstate commerce is concerned, are in a chaotic condition; that it is a mere jumble of rates and a jumble of tariffs. Why, it is well known that there are certain bases or schemes adopted by the railroad corporations of the country for making rates. As an illustration, you take the rates from the eastern seaboard cities. It is based upon a rate primarily from New York to Chicago. And a differential is allowed to Philadelphia, Baltimore, and Boston, I believe. In arriving at a rate north, east, or west of Chicago it is made plus the New York-

Chicago rate. I have a few illustrations of that; and, by the way, I have a map here that shows the entire adjustment of rates so far as that section of the country is concerned.

Take, for instance, the section in which the official classification applies, roughly described as lying east of the Mississippi River and north of the Ohio and the Potomac rivers. The whole territory is divided into territories each of which takes a portion of the Chicago rate. East St. Louis takes 116 per cent of the Chicago rate, the Chicago rate being regarded as 100 per cent. Indianapolis takes 107 per cent of the Chicago rate, Cincinnati 87 per cent, and Louisville takes the same rate as Chicago. That is, territory penetrated takes less percentages of the Chicago rate than those territories which are off from the Chicago line. I could enumerate others. Now, I do not believe that the question is as great a problem as many think.

The CHAIRMAN. May I interrupt you there?

Mr. McCHORD. Certainly.

The CHAIRMAN. What has produced the establishment of this Chicago rate and the resultant rates?

Mr. McCHORD. Investigation and the judgment of traffic men.

The CHAIRMAN. Has it been long continued?

Mr. McCHORD. Very long.

The CHAIRMAN. Ought it to be disturbed?

Mr. McCHORD. I do not know. I would not say, because I would be unworthy of the confidence of this committee, and unworthy to pass upon any interstate rates, if I should pass upon a question of that sort without the most thorough and searching investigation; and that is what I apprehend the Interstate Commerce Commission would give it if the question came before them.

As I said in the outset, this is not a proposition to upset the traffic and freight rates of this country, because as a rule, I believe, the basis for making rates is right and proper. It is the exception to the rule that wants to be cured here, and it can only be cured in one way, and that is by giving the power to the Interstate Commerce Commission, after complaint has been made, to hear and determine and fix a rate.

Now, so far as I am concerned, I have not had the time to examine the various bills that have been proposed here. I am frank to say that I am wedded to this proposition, because it was my own measure, a measure that I introduced in Kentucky, that has been upheld by the Supreme Court of the United States. There the power is given to the railroad commission, upon complaint, or upon its own motion, when it is charged or believed by the commission that a rate is or rates are extortionate, to give notice to the carrier, to hear all the evidence and arguments that may be produced, and from that and from its own investigation to determine whether that rate is just and reasonable; and if they find that the rate is not just and reasonable, then it fixes a rate that must be just and reasonable, by which the carrier is bound. There we stopped, knowing as we did that from the creation of highways, from the first building of railroads, every court in the land has been open and is open to-day to the shipper and the railroad in a properly instituted action to try the question as to whether the rate fixed is just and reasonable.

Mr. RICHARDSON. Does your rate go into effect at once?

Mr. McCHORD. After ten days' notice.

Mr. RICHARDSON. Ten days' notice?



Mr. McCHORD. To the carrier.

Mr. RICHARDSON. Then there is the right of appeal?

Mr. McCHORD. There is no appeal at all. I can not conceive how there can be an appeal from the legislative act to the court. There is, of course, the right of review everywhere in a properly instituted action, but the idea of appeal has been confused here with the idea of review. The courts have the right to review, but you can not appeal from the legislature or from the act of a legislative tribunal to the court. This is not against the railroads. It is in the interest of the railroads, and to protect them from a greater evil. I believe that these questions should be discussed and considered fairly.

I regret to see that some traffic men, some railroad men, and some shippers have so far forgotten the great question that is pending here as to inject personalities into it. I have seen it even charged in the press, or have seen the question asked, whether or not the power was sought by certain people for the purpose of selling out. I do not believe that it is fair, gentlemen, to deal with a great question in that way. If that question can be properly asked of the Interstate Commerce Commission, it can be asked of that great man who sits in the White House to-day, and, while I differ with him politically, I believe that the measures that he has proposed will immortalize him. I believe that when he carries them through he will have made the greatest President that this country has ever had.

My time is limited, gentlemen, and I yield to Judge Crump, of Virginia.

#### STATEMENT OF HON. BEVERLY T. CRUMP.

Mr. Chairman, I shall detain this committee but for a moment, as I appreciate the fact that the time is limited, and other gentlemen desire to be heard. There are, as I understand, various bills now pending before this committee, and I notice that two additional bills were introduced in the House on the day before yesterday, which I presume were likewise referred to this committee. It would seem vain on the part of anyone to attempt to discuss this general position, considering the great public importance of the proposed measures before this committee, with any degree of intelligence or efficiency, with merely a few moments in which to do it. Several hours would scarcely suffice for that. I only desire to emphasize this one point, that there seems to be a great desire and wish, not to say demand, on the part of those interested in rates in this country, that there should be action. We have in the first place the recommendation in the message of the President. We have resolutions of commercial bodies all over the country.

The committee of which I am a member appears before this committee of Congress for the purpose of representing an additional interest, and I desire to restate that fact, which has been stated by our chairman, that this National Association of Railway Commissioners represents the commissions of 30 States. At their last annual convention they adopted unanimously a resolution to the effect that the Interstate Commerce Commission should be given additional power—that is, the power to substitute one rate for a rate that they condemn. The general question is whether or not Congress should enact such legislation. Why should it not? I can not undertake to discuss that question at all from a general legal aspect. But permit me to call your

attention to one phase of it. If I understand aright the principles upon which this Government was founded, the Congress is not undertaking to manage private property, but in all this character of legislation it is resuming governmental functions which have been by its consent for some years intrusted to private parties. That unquestionably follows from the decisions of the Supreme Court of the United States from Chief Justice Marshall down.

As a general matter we find these railroad gentlemen, and among them in my section of the country are some close friends of mine, who are splendid men, patriotic men, men earnest in their endeavors to do the best they can for the commercial interests of the country, too, but in the end I say that those gentlemen, as a general proposition, in making rates are exercising a governmental function. The properties they hold are held in a public trust, under a public use. This may be a theory, but is a practice, nevertheless, that is recognized in our Government. And why should not the Government, through its own tribunals, exercise this governmental function? If a meeting of traffic men fixes a rate, they are doing what Congress has a right to do, and has, on occasions, the duty to do.

The question before this committee to decide is, without going into the merits of this proposition, whether under the present circumstances it is its duty to resume the exercise of this governmental function and to create a tribunal by extending the powers of the Interstate Commerce Commission, which shall stand between the railroad rates and the shippers. I do not think that we ought to confess in this country that a set of gentlemen acting in their private interests, however high minded they may be, however recognized they may be as men actuated by the highest motives, are such a set of men that we are unable to create a governmental tribunal to take their place which can be intrusted with the discharge of governmental functions, and for that reason we prefer to leave that to those who, as private persons, exercise those governmental functions. And on behalf of this association we ask that this legislation be enacted.

In regard to my own State, the State of Virginia, I would like to state one fact. The Old Dominion has come into line a little late. Our commission is of a recent origin, and quite unique. I doubt whether there is such a body as that body is almost in the world. It was created by the Virginia constitutional convention which promulgated a new constitution about two years ago. That convention was composed of the best men in Virginia. It was unquestionably the best body of men that have collected together in the State of Virginia, certainly since the war. There was scarcely a man in it who had been to the legislature; there was scarcely a man in it who had held or would accept a public office of any kind. [Laughter.] I was not a member of it, I would say.

Mr. MANN. You had been a member of the legislature?

Mr. CRUMP. I had been a member of the legislature for one session a number of years ago, and that cured my taste for public office, and I felt that I would never be willing to hold a public office again. I only want a professional office. I have been a lawyer all my life.

Such a body as that constitutional convention certainly expressed the desire of Virginia as to the regulation of railroad rates—of course in that case only intrastate rates—and they created a commission to prescribe rates, originally, and with the power to correct rates on com-

plaint, and with the power to put rates into effect and then to sit as a court, and if the rates were not observed or any regulation promulgated by them as a commission was not obeyed, they have the right as a court to act. We have all the paraphernalia of a court. We have the marshal, called a bailiff, who serves our processes; we have the right to summon the railroad if it violates any of our enactments; we have the power and the right to make enactments, and when we summon the parties we have the right to try them and impose a fine on them and to issue a process from our clerk's office, and to enforce that fine. I doubt whether there has ever been a body created that so distinctly combined legislative, judicial, and administrative functions of that kind.

The CHAIRMAN. And inquisitorial?

Mr. CRUMP. Yes, sir; and inquisitorial. But, mark me—no, Mr. Chairman, I do not say inquisitorial, because I do not think it is proper. Either the Supreme Court of the United States is wrong or it is not inquisitorial to do what the Government has the right to do, and to do what it is its duty to do. I come back to this original proposition, that the making of rates and the regulation of railroads is an exercise of governmental power. And when we create a tribunal we are not creating a tribunal to pry into private secrets or to exercise dominion over private property, but we are taking away from private persons governmental functions which they have been allowed to discharge. So that I say it is not exactly inquisitorial, in my mind.

The CHAIRMAN. When I asked you the question I was under the impression that the word "inquisitorial" might cover duties and purposes that were not offensive.

Mr. CRUMP. I understood, of course, the meaning of the term, sir. But I was only coming back to this original principle, which I had in mind. I will not detain the committee any longer. I think that there are tribunals in the country that can be entrusted with the making of laws and the executing of them at the same time.

#### **STATEMENT OF HON. WILLIAM B. HEARST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK.**

Mr. HEARST. I have practically finished with my bill, but I notice that two bills have been introduced since I addressed the committee the other day and that those bills contain some provisions that are not in my bill, and they do not contain other provisions that are in my bill.

The CHAIRMAN. Will twenty minutes be enough time for you?

Mr. HEARST. That will be ample.

Mr. RICHARDSON. What bills are these that you speak of?

Mr. HEARST. Bills introduced by Mr. Esch and Mr. Townsend.

Mr. ADAMSON. Have you not seen the bill introduced by Mr. Davey, also?

Mr. HEARST. Yes, sir; I saw something introduced by Mr. Davey.

Mr. MANN. And by Mr. Shackleford and others?

Mr. HEARST. I made particular reference to the bills of Mr. Townsend and Mr. Esch because they contain many provisions similar to those in my bill, and, as I say, they contain some provisions that are not in my bill, and my bill contains some provisions that are not in theirs, and I do not propose to criticise, but simply to say why I did not include certain provisions and why I did include others which are not in the bills which Mr. Townsend and Mr. Esch have just introduced.

As the time is very limited, I suggest that I take merely the most important provisions.

Section 1 of Mr. Townsend's bill establishes a court of transportation. I think perhaps the name "court of transportation" is fully as good as the name "court of interstate commerce," which is in my bill.

My bill provides for three judges at salaries of \$10,000 a year each. Presumably, better judges can be obtained for \$10,000 each than can be obtained for \$8,000. Anyhow, if they are to be the best grade of judges, they should receive compensation in proportion to their excellence. I maintain that it is better to have three first-class judges with first-class salaries than to have five slightly inferior judges at \$8,000 a year, or seven still slightly inferior judges at \$6,000, or nine at \$4,000, or a dozen at \$1,000 a year. I believe in good salaries for good judges.

Section 2 does not call for special comment. It provides, like my bill, for sessions of court in any part of the country.

Section 3 confers upon the court jurisdiction over all suits brought to enforce the act, and requires no special comment, embodying as it does the principles of my bill.

Section 4 merely amplifies section 3 by providing generally that the court shall possess all the powers of a circuit court of the United States.

Section 5 of Mr. Townsend's bill provides, as does my bill, that the hearing in the transportation court shall be upon the record made below, but it contains a clause permitting evidence which the railroad claims could not have been with due diligence discovered before the trial by the Commission to be offered there. I did not include that in my bill, because it seemed to me that anything of that kind simply left a large loophole, and would result inevitably in the double trials which we are so anxious to avoid and which are such an abuse under the existing system.

Mr. ADAMSON. While that may be right, ought not the new hearing to be had before the Commission and not before the court? Ought not the additional testimony to be heard before the Commission? Do you think it is right for the Commission to be reversed on testimony that it never heard and passed upon at all? If there is going to be a rehearing as provided on the showing of due diligence on the part of the railroad, ought not that rehearing to be had before the Commission and not before the court that is reviewing the proceedings of the Commission?

Mr. HEARST. That is, in a way, the point that I was trying to make. But I do not think the case should be remanded to the Commission on that point. The case might properly be remanded if the Commission had refused to accept evidence which the defendant had offered and which ought properly to have been accepted.

Mr. TOWNSEND. Does the bill that you are discussing make provision for that?

Mr. HEARST. The bill which you introduced, Mr. Townsend, so far as I am able to understand by a hasty reading of it, in section 6 provides that the court may examine witnesses and bring before it parties from all over the country. This is, of course, only necessary when there is going to be a double trial, and it seems to me that your bill contemplates to that extent the continuation of the double-trial evil. It leaves a loophole for the double trial and for possible delays and the

other evils of double trials. I do not presume to dictate what you should put in your bill, but I say that I did not introduce it in my bill for the reasons given.

Furthermore, it should be observed that my bill provides for and contemplates such expeditious action after the decision of the Commission that there will be practically no opportunity to discover additional evidence, since a very brief interval will elapse between the trial before the Commission and the hearing under appeal.

Mr. ADAMSON. You do not hope for the millennial condition of the law that will cut off all possibilities of litigation?

Mr. HEARST. Not unless you pass my bill, and I doubt very much if you will do that. [Laughter.]

Section 7 of the Townsend bill contains no noteworthy provisions except that authorizing the transportation court to grant temporary restraining orders at any time previous to the hearing of the appeal. The opportunities for appeal are more limited under the language of my bill, which says the court "can only grant stays in case of obvious and manifest error." The whole object of my bill, as I explained it yesterday, is to prevent delay and secure effective action in the briefest possible time.

Section 8 of the Townsend bill provides for the summoning of talesmen to act as jurors in the District of Columbia in cases involving right of trial by jury. The cases contemplated are damage suits for reparation which must be brought before a jury. The present procedure is that when the Commission awards or recommends reparation, the shipper proceeds before a jury in any circuit or district court where he resides to sue for damages, and on presenting the order of the Commission rests his case, whereupon the burden is thrown upon the railroad of showing that the order of the Commission is unjust. Under these circumstances it seems to me that the shipper is very likely to get fair consideration and full justice in each case, and there is not any complaint about the effectiveness of this procedure, once the order of reparation has been made. To transfer all of these jury cases to the transportation court would greatly burden the court and interfere with its effectiveness in other cases.

Moreover, if I understand the provision of the bill rightly, this section provides for the summoning of talesmen to act as jurors in the District of Columbia by the marshal here, and consequently all cases of that kind would have to be heard here. And it would be a great hardship to compel complainants in all these cases to come to the District of Columbia for trial instead of being able to go before a jury in their own neighborhood.

Mr. TOWNSEND. I will state to you that, in my opinion, there should be an addition there, the same as there is in the last provision of the bill, that the court may order the marshal of the United States for the District of Columbia, or for any district where the court is held, to summon talesmen, if it makes provision that the chief justice may send two of the justices anywhere in the United States to try a case.

Mr. HEARST. Yes; with that correction, then, we will pass from that.

It still seems to me that this court is likely to have a greatly increased amount of business before it on account of the increased powers given to the Commission—the increased effectiveness given to the Commission—and that a great many cases, probably four or five times as many

cases as now come before the Commission will come before the Commission when it is believed that some effective aid may be obtained. The proposed court would then be unnecessarily burdened by these reparation cases, which are effectively and adequately dealt with under the present system.

Mr. TOWNSEND. Was that the experience during the first ten years when this power was exercised by the Commission?

Mr. HEARST. The first ten years were very largely employed in deciding what powers the Commission had through cases before the courts. It seems to me that in nearly all those cases which Mr. Spencer referred to the other day, cases in which the Commission was reversed in technicalities, that it was not very distinctly known what the powers of the Commission were, and as the cases before the court largely resulted in reversals, shippers must have been doubtful and discouraged and unwilling to bring cases before the Commission. I should think that it would hardly be fair to make a comparison with that period.

Mr. ADAMSON. I was going to ask this; if, instead of largely increasing the litigation, it is not true that the chief advantage to be hoped from securing a more perfect system is not this, that the carriers, knowing that correction and regulation would certainly follow in case it was necessary, would either adjust their rates more carefully themselves or satisfy complainants and compromise the matter before going into litigation?

Mr. HEARST. I think that is certainly to be hoped for. I do not say that it would increase the present amount of litigation, because I doubt if anything could increase the present litigation. Each particular case, like my coal case, which has taken over two years, is involved in an immense amount of litigation, and it is only a typical case.

Mr. ADAMSON. That was because of the system applying at that time to that case. If you had had a system from which it would have been possible to prejudge what the result would have been, would not they have compromised that case?

Mr. HEARST. I think they might, but if they have extended to them the opportunity to raise disputes on innumerable particulars they will certainly take advantage of it. If you give them opportunities for appeal after appeal they probably will continue to appeal and appeal. I am coming to the question of the granting of appeals and the granting of stays.

Mr. ADAMSON. The law already vests the common-law courts with power to grant an appeal, and it is immaterial whether you fix an appeal, is it not?

Mr. HEARST. Hardly; because you can fix the appeal, as I did, on review to the interstate-commerce court, and not carry it up to the Supreme Court of the United States except in cases where a grave constitutional question is involved. That is one of the chief features of my bill.

Mr. TOWNSEND. Who is to decide what a grave constitutional question is?

Mr. HEARST. The Supreme Court frequently decides that question by a writ of certiorari. I am not a technical lawyer, but I believe that is the method.

Mr. ADAMSON. Does not a court often decide the thing in the outset, before it goes to the court?

Mr. HEARST. Yes, sir; and I provided in my bill that either the interstate-commerce court or the Supreme Court may decide that a case involves questions that should be reviewed by the Supreme Court. But the very distinct and notable difference is that practically the same amount of appeals are allowed in Mr. Townsend's bill as are allowed now, as you said just a moment ago, if I understood you, while in my bill that is not the case. The object is to secure expedition and effectiveness, and the appeal is limited to the one court.

Mr. ADAMSON. And the more of that you get the less litigation you have, because the railroads will find it out and fix their own rates.

Mr. HEARST. That is theory, and it may be correct, Mr. Adamson; but on the other hand, it seems to me, as I said, that the railroads are likely to take advantage of every opportunity for delay, and there is no reason for providing them with very many opportunities. That is my opinion. I am simply explaining why I did not put that in my bill.

In my coal case, which I cited the other day, we found that the appeals took a year's time, and then the case was finally decided by the Supreme Court upholding the Commission in every point. One of the objects of my bill was to prevent that long delay and those numerous appeals. Naturally, I think my bill is preferable on that point.

Another thing is, despite the giving of the bond in the appeal to the Supreme Court, a situation must necessarily continue to exist which will work harm to the consumer—to the common people—say, for instance, as in the coal case. I speak of that as I am familiar with it. The rate is \$1.55. Suppose the Commission should decide that a just rate was \$1, and suppose that the appeals permissible under this bill consume, as they actually did in my coal case, a year, the rate during that period would remain at \$1.55 and the coal sold in New York would be based on the high rate, and the price would necessarily be in proportion to the high rate, and during that period, therefore, the consumer would be paying 55 cents more for his coal than he would if those appeals were not involved. And you can not recompense the consumer by any bond. You can only make that bond apply to the shipper.

Mr. ADAMSON. How could you fix a condition in a bond where a man was a business man whose business was being discriminated against, how could you fix a provision in a bond which would protect him against the future consequences of that unjust rate? During the pendency of the litigation his business might be wiped out of existence entirely.

Mr. HEARST. I did not understand that.

Mr. ADAMSON. You say that you can not provide for the consumer, but you can for the shipper. Now, the railroad makes a bond, suppose, for some excessive rate that the shipper pays, and that is all that you can get them to do?

Mr. HEARST. Yes, sir.

Mr. ADAMSON. If they were to give a bond covering all his business, the court would say that you can not testify about speculative damages, and that would shut him out, and by the time the litigation is ended and the railroad is compelled to pay back the excessive freight, the man's business is wiped out by the discrimination. How would you provide for that?

Mr. HEARST. I do not provide for any bond at all.

Mr. ADAMSON. How can it be done at all?

Mr. HEARST. I provide that this interstate commerce court, as I call it—transportation court, as Mr. Townsend calls it—shall review the finding of the Commission, and that there shall not be any appeal from it except in case of grave constitutional questions.

Mr. LOVERING. So far as the mere shipper is concerned, the object could be accomplished by impounding the difference, could it not?

Mr. HEARST. Possibly. But it seems to me there is no way in which you can recompense the consumer.

Mr. LOVERING. No. I agree with you there.

Mr. ADAMSON. It would protect the carrier to impound the excess, but it would not protect the shipper to impound, because it would ruin his business in the meanwhile before a decision would be arrived at.

Mr. TOWNSEND. Now, to get my notion a little clearer before you, as you have been discussing my bill: You say in cases where grave constitutional questions are involved there shall be an appeal, and that, you say, is a matter to be decided by the Supreme Court as to whether an appeal shall lie or not. You do not deny, of course, that that question will be raised by every aggrieved party, or by the railroads, especially if they are aggrieved, and that they will claim that there is a grave constitutional question involved? The bill here provides that the court may decide when an appeal shall be taken. It also provides for this bond, for the reason that I know of no law that could be passed that would prevent the suing out of a writ to stay proceedings of any kind until a review is had if it should appear that there was a serious defect in the law. Would you not want a bond under those circumstances?

Mr. HEARST. I do not see any particular objection to a bond. Your bill seems to me to allow greater latitude for appeal than my own does. If it is the same on that point as my bill I have not any criticism to make, but I believe that if the cases before the Commission under an effective law increase, as I think they will, and all cases are allowed to be taken up to the Supreme Court, as they will be under your bill, there will not only be great delay, but the Supreme Court will have to abdicate all of its other functions and become merely a supreme interstate commerce court.

The CHAIRMAN. The other day certain questions were propounded to you that at the time you were not able to answer in connection with this coal case that you have prosecuted. I would like to ask you now if you could tell the committee the value of the royalty of a ton of coal, the cost of mining it. You have given us the just rate for transporting it. I want to get that information if you have it now.

Mr. HEARST. I did not look it up, I am sorry to say. I could give the facts you require generally, but I would rather not; I would rather give them definitely and specifically, if you will allow me to do that.

The CHAIRMAN. If you will furnish that in a memorandum I wish you would do so.

Mr. HEARST. Yes, sir; I will do so. There is another bill, which has been introduced by Mr. Esch, and I would like to touch on that in some degree where it differs from my bill, and explain my bill in that connection. I think that it differs in the first paragraph. The Commission has now, under the present act, power to institute proceedings on its own motion, and by the existing act it is given the power to institute inquiries into the business of common carriers, and the



Supreme Court has in several cases announced, as in the coal case, that it was the duty of the Commission to carry on its investigations of its own motion, and that it had such powers; and Mr. Esch's bill, which says that the Commission may proceed on complaint, it seems to me, may limit those powers rather than enlarge them; may limit the present powers of the Commission, although undoubtedly Mr. Esch's bill in this paragraph confers other very largely increased powers, namely, the power to fix rates. But I think my bill, which has also given the Commission the power to fix rates, but omits the words "on complaint," is better to that extent. Certainly if the Commission discovers unjust conditions it should have the power to remedy them with or without complaint, provided the facts have been properly developed and tried out before the Commission.

Then the question of part water and part rail transportation is handled in my bill, as I do not understand it to be handled in Mr. Esch's bill. The existing act covers traffic part rail and part water for shipments when made over a rail and water route which is all under one management or under one control. My bill covers part rail and part water transportation, even when the water line is independent.

MR. ADAMSON. What do you understand to be the desirable purpose of seeking to put water transportation under the commerce law?

MR. HEARST. To prevent a discrimination that may occur on water as well as on land.

MR. ADAMSON. Is it for the purpose of forcing them to charge higher rates in order that the railroads may compete with them?

MR. HEARST. I should not express it that way.

MR. ADAMSON. How would you express it? Is it not because they give lower rates than railroads can give that this is desired, because it is thought desirable to raise them so that the railroad can compete with the water rates?

MR. HEARST. It is because they discriminate.

MR. ADAMSON. Charge lower rates than the railroads?

MR. HEARST. May charge lower to one individual, and may not charge lower to another individual. In other words the definition of the word discrimination.

MR. ADAMSON. Is that all the reason that you have heard of or know of?

MR. HEARST. That seems to be the chief reason.

MR. ADAMSON. You never heard that it was desirable to prevent them charging such low rates as were unfair to the railroads?

MR. HEARST. I never heard that.

THE CHAIRMAN. Was it intended by your bill to include other shipments? European shipments, for example?

MR. HEARST. No, sir; it was not. I replied to that question day before yesterday, Mr. Chairman.

In my bill all the different kinds of water traffic—river traffic, lake traffic, and coastwise traffic—were put under the provisions of the commerce act if they were connecting lines, no matter whether the water roads were owned and controlled by the railroad lines or not. That is, it applies where a shipment is made from Albany to Chicago, to Omaha, to Ogden, and then to San Francisco, and it also applies if the shipment is made from Albany through New York to Panama and thence to San Francisco, and the rail and water lines do not have to be under the same control.

That is, the present interstate law does not include such a shipment unless the lines were under one control, and my bill makes it apply even though they are not under one control.

Mr. MANN. Would that eliminate the use of tramp steamers?

Mr. HEARST. I do not see how it would. I do not see how it would eliminate anything.

Mr. MANN. If all water transportation, say on the lakes, is put under the interstate-commerce act, the tramp steamer evidently could not file a schedule of rates?

Mr. HEARST. Why could it not?

Mr. MANN. It would not be a tramp steamer if it could file a schedule of rates.

Mr. HEARST. Is there any particular advantage in having it known as a tramp steamer? It could file rates. It has rates unquestionably, and if it has them, it might file them.

Mr. ADAMSON. If a line from New York via Colon, Panama, to San Francisco, under the control of the interstate-commerce act, should charge a rate lower than the transcontinental railroad charged, and if the Interstate Commerce Commission had power to raise that rate through Colon, Panama, so as to equalize it by raising it to the railroad rates, there would be no benefit derived by the construction of the Panama Canal, would there?

Mr. HEARST. My idea is not to have the Panama route raised to the same amount as any other route. Obviously a water route could and would charge less than a rail route, but it could not or would not be allowed to discriminate between shippers and give rebates in my bill.

Mr. ADAMSON. We are not confining our remarks to any one bill. I am speaking of all these bills.

Mr. HEARST. Yes, sir. I would not think that it was necessary to have any rate raised at all. There might be very good reasons why it should be lowered. But my plan is to bring under the interstate-commerce act these part rail and part water classes in order to prevent discriminations and rebates and other abuses that the present law does not touch if the water lines are independent.

The Esch bill omits to make any provision to prevent a railroad from posting joint rates that have not been concurred in by all connecting carriers.

Mr. ADAMSON. That is, in the original act that this seeks to amend, is it not?

Mr. HEARST. There are two other provisions in this section of my bill to which no attention is paid in the Esch bill, but which I deem worthy of mention. One, the requirement that before any change in rate shall be made thirty days' notice shall be given to shippers and the Commission, for the reason that very short notice, such as permitted at present, is an obviously easy method of granting favored rates.

#### SECTION 6.—JOINT RATE.

For instance, the carriers can agree on a joint rate, but wrongfully agree so as to bring about a preference or rebate, as is the favorite method to-day, instanced by the terminal railroad abuses.

My bill makes it clear that the jurisdiction of the Commission extends to these abuses and authorizes the Commission to issue orders in relation to joint rates and the division thereof.

## THE PROVISION OF OTHER FACILITIES, PRIVATE CARS, ETC.

The Esch bill makes no provision that I can understand to apply to the private-car abuse, and that is one which in the testimony before this committee has been shown to be one of the greatest abuses.

My bill makes provision for that in two places in section 6, where the Commission is authorized to issue orders affecting the apportionment of cars, the provision of other facilities connected with and incidental to transportation. Refrigerating obviously comes under the head of facilities connected with and incidental to transportation.

Again, in the last paragraph of section 7, my bill provides—

in case any person, company, or corporation other than a carrier, who may be interested in the traffic or transportation involved, shall be included as a party defendant or respondent in addition to the carrier in a proceeding before the Commission, orders may issue against such additional party in the same manner, to the same extent, and subject to the same provisions as are authorized with respect to carriers.

In other words, if the abuse under consideration were a private-car abuse and it was proper and necessary to make Armour & Co., for instance, a party defendant as the owner of the private cars and as one interested in traffic or transportation involved, the orders of the Commission would be as effective against Armour & Co. as though Armour & Co. were the railroad corporation.

## CLASSIFICATION.

There are a number of other things with which I do not want to take up the time of the committee, but which I have put in my bill after full consideration, and which are certainly advantages if not absolutely essential.

My bill provides that the Commission may issue orders regarding the classification of freight articles involved in the proceeding, and this is important, for obviously a rate can be raised as effectively by transferring it from one classification to another as in any other manner. In fact, in the hay case which has been under consideration for several years, hay was transferred by the railroads from one classification to another, thereby raising the rate. The Commission endeavored to prevent this. The railroads maintained that the Commission had no authority, and that case has been under advisement altogether about three years.

This clause proposes to give the Commission authority in such cases. And furthermore it proposes to give the Commission authority to issue orders affecting through and continuous carriage over connecting lines of roads, including intersecting switches or connections.

And it furthermore gives them authority over abuses analagous to the terminal railroad abuses.

Another important provision in my bill is the one that compels the railroad to furnish cars to a shipper if by any means they can furnish cars, and does not compel him to prove that he is being discriminated against and to show that cars are being furnished to somebody else to his disadvantage. For instance, in my coal case, it developed that the Reading Railroad for certain purposes withdrew all tariffs on coal to New York tide water, and that when these tariffs had been withdrawn no shipper was allowed to have cars to ship coal from the mines to that tide-water point.

The object of this was of course to keep the price of coal from breaking in New York. No matter what the hardship might be to the shipper by having his revenue cut off for weeks at a time, the railroad persistently refused to handle any traffic to that point. In other words, it abdicated its function of common carrier. My bill cures that evil, enables the shipper to get an order for cars and have his product transported. And on the application the shipper is not required to show that any other shipper is being unduly preferred. The mere failure to forward his freight is enough.

Finally the Esch bill refers to a transportation court, although there is now no transportation court created by law. And unless the Townsend bill, which provides for a transportation court, should pass, the Esch bill would have no meaning.

The Esch bill and the Townsend bill are largely my bill divided between them, with a few things that I consider good omitted and a few things that I consider bad added.

The CHAIRMAN. You have consumed twenty-five minutes, Mr. Hearst.

Mr. HEARST. Very well, Mr. Chairman. I will file what notes I have left with the committee instead of continuing the argument.

My notes relate to the Quarles-Cooper bill and to decisions by the courts indicating that Congress has power to delegate the power to fix rates to a commission, but may not impose the power of fixing rates upon a court.

#### POINTS AGAINST QUARLES-COOPER BILL.

##### I. Permits taking additional testimony in Federal courts on review.

(1) This encourages railroads in practice of not disclosing their side of case before the Commission, thus multiplying chances of erroneous finding by Commission, with incidental and protracted delay.

(2) This means a double trial, one of the evils of the existing law, thus imposing great expense on complainant and a useless burden upon the courts, which are already far behind their calendars.

##### II. Permits railroads to select the judge to retry case from any circuit through which roads run.

(1) This renders it quite feasible for the railroad to insure trial of every case before friendly judge, who, if not absolutely controlled, is amenable to influence of political and local considerations.

(2) This leads to conflicting and erroneous decisions because of the large number of judges from whom the selections can be made, most of whom have had no training or experience in this special branch of law.

##### III. Makes it almost a matter of course that all orders would be stayed for a year or more.

(1) Because with the power of selecting the judge and the wide field to choose from, it would be obviously easy for a railroad to find a judge who would grant a stay. Witness the practice in New York State of procuring from up-State judges "certificates of reasonable doubt" in criminal cases.

##### IV. Permits an appeal to the Supreme Court in every case.

(1) The Supreme Court is already overburdened, and as these appeals are made preferred cases, the progress of other cases, which now require two years or more to be reached, would be greatly impeded.

(2) Adds enormously to the expense and difficulty of successful prosecution, and thus discourages resort to the law.

V. Fails to provide effective means of compelling before Commission production of papers and answering of questions.

(1) This is one of the worst evils of the existing law, under which a case can be halted for a year while the relevancy of a paper or of a question is being litigated all the way up to the Supreme Court, as in the coal trust case.

This bill does not touch matter of terminal railroads or private car abuses at all, and these are among the greatest and most outrageous abuses existing.

#### MERITS OF HEARST BILL.

I. Avoids all the enumerated objections to Quarles-Cooper bill.

II. Provides a trained and experienced court for this special branch of law.

III. Judges less liable to be controlled by railroads, for, as every case would come up before them and they would be conspicuously before the public, a positive tendency to favor the railroads would be patent and therefore unsafe and improbable.

#### CONSTITUTIONAL QUESTION.

##### COMMISSION CAN FIX RATE.

SECTION 1. Congress has power to regulate interstate commerce. (Constitution, section 8.)

Power to regulate includes power to fix a rate.

Maximum rate case (vol. 167, U. S.—opinions of Supreme Court), Judge Brewer: "Congress might itself prescribe rates."

Reagan case (154 U. S.):

The power of fixing rates is not a matter within the absolute discretion of the carriers, but is subject to legislative control.

"The legislature has power to fix rates." (143 U. S.)

##### THIS POWER CAN BE DELEGATED.

Maximum rate case (167 U. S.):

Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty.

Reagan case (154 U. S.):

There can be no doubt of the general power of a State to regulate the fares and freights which may be charged or received by railroads or other carriers, and that this regulation can be carried on by means of a commission.

Similarly decided in State railroad commission cases. (116 U. S.)

In maximum rate case, where the court held that under the existing law the Commission did not have power to fix a rate, its decision was based solely on the fact that the express words giving power were not contained in the act and that it would not imply such broad powers. No suggestion was made that this power could not be delegated. On the other hand, the court quoted the statutes from a dozen or more States where the power to fix rates was given to commissions, such as

Alabama, California, Florida, Georgia, Illinois, Iowa, Minnesota, Mississippi, New Hampshire, South Carolina, Kansas, and New York.

[New York statute.]

If in the judgment of State railroad commissioners it appears necessary that additional terminal facilities shall be afforded, or that any change of rates of fare for transporting freight or passengers or in the method of operating a road or conducting its business is reasonable or expedient in order to promote the security, convenience, and accommodation of the public, the board shall give notice and information in writing to the corporation of the improvements and changes which they deem proper. The supreme court, at special term, shall have the power in its discretion in all cases of decision and recommendations by the board which are just and reasonable to compel compliance therewith by mandamus.

#### NOT CONFINED TO COMPLAINT.

Reagan case (154 U. S.), Judge Brewer:

It is not to be supposed that a commission appointed under the authority of any State will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property as well as to other individuals.

Coal trust case (194 U. S.):

Powers conferred upon the commission, under section 12 of the act, to inquire into the management of the business of all common carriers, subject to the provisions of the act, and keep itself informed as to the manner and method in which the same are conducted.

Maximum rate case (167 U. S.):

The Commission is charged with the general duty of inquiring as to the management of the business of railroad companies and to keep itself informed as to the manner in which the same is conducted.

#### CONSTITUTIONAL QUESTION.

COURT CAN NOT FIX RATE.

Reagan v. Farmers' Loan and Trust Company (154 U. S.):

The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work.

This rule specifically restated in St. Louis and Santa Fe Railroad Company v. Gill (156 U. S., 662).

San Diego Land and Town Company v. National City (174 U. S., 739):

But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without just compensation.

Trammel v. Dinsmore (102 Fed. Rep.), 800 circuit court of appeals):

The formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. The courts are not authorized to revise or change the body of rates imposed by the commission.

Western Union v. Myatt (98 Fed. Rep., 335):

Concise stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing or prescribed rates are unreasonable is a judicial function.

tion. That this is the settled doctrine of this country is no longer open to question. It is firmly fixed in the body of our jurisprudence. It follows, therefore, as a corollary of this doctrine that courts have no power to prescribe a schedule or rates and charges for persons engaged in a public or quasi public service, because that is a legislative prerogative. The legislative prerogative is the power to make the law to prescribe the regulation or rule of action; the jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different.

The fundamental reason for these decisions is that all power to regulate commerce, from which flows the right to fix rates, is derived from the Constitution. Where the Constitution confers no power, no power lies. The Constitution has expressly given this power to Congress and has refrained from giving it to the judiciary. Fundamentally therefore and wholly apart from the constitutional separation of the Executive, the legislature, and the judiciary there is no possible basis for asserting that the courts might fix a rate.

If anything more is needed, see *Hayburn's case* (2 Dallas, 409), *United States v. Ferreira* (54 U. S., 40), and *Interstate Commerce Commission v. Brimson* (154 U. S.).

All to the effect that it is not in the power of Congress to assign to the courts of the United States any duties except such as are properly judicial and to be performed in a judicial manner.

#### THE COST OF MINING COAL.

Replying to the questions of the chairman concerning the cost of mining and preparing anthracite coal, I find on referring to the testimony that the average cost per ton to the Philadelphia and Reading Coal and Iron Company, the largest company in the trust, for six months ending April 30, 1904, was \$2.31 a ton, and for the six months ending April 30, 1900, \$1.79 a ton, showing an increase of 52 cents a ton. These figures cover all sizes. I might state parenthetically that the average increase in the selling price of the domestic sizes during the same period is \$1.14 a ton. This period of increased cost includes both advances in wages after the two strikes. It is clear that the coal companies have not only made the public bear the entire burden of the strike awards, but have actually turned the strikes into a source of profit.

The following figures for the Reading Company, just mentioned, for the month of April, 1904, during which month the cost of mining and preparing coal was \$2.06 a ton is fairly illustrative of the elements that make up the cost.

Mining, \$1.43; repairs, \$0.07; deadwork, \$0.23; colliery improvements, \$0.17; royalty, \$0.06; department expenses, \$0.07; proportion of general expenses, \$0.02. The cost to the Delaware and Hudson Company for mining coal during the month of January, 1904, was \$2.14 a ton, including a sinking fund of 4 cents a ton and general office expenses of 6 cents a ton, and the various other elements mentioned in the Reading statement.

These figures may be taken as fairly typical of the other companies, including the Lehigh Valley Coal Company, where the cost was \$2.25 a ton, and it was claimed by the company that the profit for the year ending June 30, 1904, on a business of 5,000,000 tons was but \$0.079 a ton. They claimed to account for the discrepancy between the sell-

ing price of \$5 and the cost of \$2.23, plus the freight rate of \$1.55, by alleging that on the small sizes, such as pea coal and the like, which constitute about 40 per cent of the total output, there is a loss after paying the freight rates, because the selling price of the smaller sizes averages under \$3 a ton.

These figures sufficiently show the intimate relation between the freight rate and the selling price of coal. They demonstrate with equal force that coal freight rates are so exorbitant that it is with the greatest difficulty that the mining company is able to keep its head above water, and its only chance of making a reasonable profit, after paying excessive freight, is by increasing the selling price to the consumer. This is exactly what has been done. The freight rates are the key to the situation. It is at these unreasonable freight rates maintained by a combination of railroads in control of both the means of transportation (and most of the production) that I am striking in my pending suit before the Interstate Commerce Commission.

#### STATEMENT OF WALKER D. HINES, ESQ.

Mr. HINES. Mr. Chairman and gentlemen of the committee, I appear here in behalf of the Atlantic Coast Line and the Louisville and Nashville Railroad. Mr. Erwin, president of the Coast Line, was here yesterday and expected to make a preliminary statement on behalf of that company, but he was called to New York by important engagements, and as we had discussed the matter, and our views coincided, he left the matter to me entirely.

It would perhaps be well for me at the outset to state in a general way what opportunity I have had to form conclusions on this subject. As early as 1895, while I was in the law department of the Louisville and Nashville Railroad Company, I began a close study of the interstate-commerce act on account of traffic questions then arising in Kentucky. In 1897 I enlarged that study on account of the efforts which began then to secure the rate-making power for the Commission. Until 1901 I remained in the law department of the Louisville and Nashville Railway Company and continued to make a special study of these questions. I was then made first vice-president of the company, in charge of traffic matters as well as law matters, and until last July, when I resigned from the company to enter the general practice of the law, I continued to give the question special attention.

I may say on behalf of the two railroad companies for which I appear, and I think on behalf of railroads generally, that there is no effort to deny the propriety or necessity of effective regulation of the railroads. I think if the day ever existed, and probably it did, when railroad managers denied the right or propriety of it, that day has passed. The public certainly expect effective regulation; and I realize and I believe that the railroads generally realize, that effective regulation must be had. The question is, What is the best effective regulation? What are the evils that call for regulation? What regulations will correct those evils? And what are the possible evils that may flow from any character of regulation that may be adopted?

As this committee is considering various bills which nearly all



involve in one way or another the rate-making power, and as that seems to be the vital thing now under consideration, it seems proper at the outset to consider briefly what is the necessary scope of the rate-making power, if conferred upon any tribunal. I am glad to say that the fallacy which has misled a great many people, that you can give a rate-making power which is not a general rate-making power, seems to have been pretty effectively exploded.

We still hear some talk about not making rates in the first instance, not making original rates, making rates only on complaint and notice, and after investigation, but I think it is generally recognized that if you put all those incidents in it can not change the substantial and the general character of the power. Suppose, to illustrate it briefly, that Mr. Jones is appointed traffic manager of a railroad company. He can not make rates in the first instance, because they are already made. He does not undertake to make rates generally; he does not undertake to make rates except when a case arises for considering the propriety or the applicability of an existing rate to a new situation, or on account of some trouble that has arisen as to an existing situation. Presumably he does not make a rate without finding out what he is doing.

You give the power to any tribunal to make a rate on notice and after investigation, and you give that tribunal the power for all practical purposes to do exactly what the traffic manager of that railroad company would do. No matter how you restrict it, if you say that it shall make only one rate in a proceeding, or that it shall make a rate only on complaint, that is simply a difference in incidents; it is not a difference in substance, and a tribunal vested with the power in the most restricted language which could be devised would still have the power, one at a time, it may be, but still the power, to change every rate it thought ought to be changed. If it could not originate a complaint itself, you can not find a rate anywhere that somebody is not ready to complain against, if he thinks that he is to be benefited by it, so that complaints would come, and fullest opportunity would be given to change every rate which that tribunal wanted to change. And, no matter how you frame the language that confers the power, the fact still remains that a tribunal with the rate-making power is the traffic manager of every railroad company in the United States to whatever extent it chooses to exercise that power.

Now, I think the situation ought to be, and I think now is being, faced with a full appreciation that there is no sticking your head in the sand on that proposition; that if you give the rate-making power, you give the rate-making power, and that there is not a little rate-making power and a big rate-making power, but there is simply one, and you give it or withhold it.

Now, let us consider what is meant and what will be some of the important effects of giving that power to any governmental tribunal. In the first place—and this is the point that I think has not been generally touched upon or appreciated—whenever any tribunal undertakes to make a railroad rate it necessarily becomes the perpetual administrator of that rate. It is not like a case in court. When a court decides a case, that case is done. The court goes on and decides some other case. But when a railroad commission or any tribunal makes a rate, which is necessarily a rate for the future, its work is not done; its work has just begun.

The rate-making business is never finished. You make a rate, but that does not finish that rate. It is always a question with you as to the application of that rate to new conditions or to old conditions which have been overlooked, or the adjustment of it to existing rates, to which it must bear a relation. There is scarcely an occasion when the traffic officers of railroads undertake to prescribe a new adjustment, or to readjust an old adjustment of rates, but that almost as soon as it is done something does not crop out that has not been thought of that needs adjustment to additional conditions. The most experienced traffic man, one who has confined his observations to traffic in a particular section and is as near a specialist on the traffic of that section as anybody can be, can not possibly make a rate adjustment affecting several places but what he will find as soon as he does it that something else has to be done, and something may have to be done next month and something else next year, in respect to that adjustment. You take a tribunal that attempts to do that for the whole United States, and which can not have as to any special section the special knowledge that the traffic officers in that section have with respect to it, and that necessity of changing what you have done to meet things you have overlooked becomes more pressing and more general than it can possibly be under present conditions.

Moreover, there is such an interdependence of rates that if one is fixed something has to be done for another. For a rate that is fixed for one point you will have perhaps twenty points that will straightway find they have been affected by that reduction. As I said to begin with on this point, when the Commission fixes a rate it simply begins its work as to that special rate. When it makes a rate it does not get a rate off its hands, but it gets one on its hands. When it makes a number of rates it does not get that much work behind it, but that much more work ahead of it, because it is bound to administer those rates and change them from time to time. This will be particularly true with respect to the adjustment of rates between localities, which, as is apparent from the hearings here, is the principal sort of work that a rate-making tribunal would undertake. You prescribe an adjustment between localities, and, as I say, other localities straightway crop up that had not been thought of before, and it has to be adjusted to them. Perhaps next year some one commodity will be affected by new conditions—a new place of production, or the discovery of a new source of supply, or something of that sort—and that adjustment, while proper generally, may have to be changed with respect to that one commodity.

Mr. MANN. Perhaps you can give me a little light on one question. Last year the Interstate Commerce Commission reported that over 160,000 tariff rates or tariff schedules were filed with the Commission. Do you know whether each one of those contained a change in some rate?

Mr. HINES. Not necessarily; but in all probability it involved some change in some rate.

Mr. MANN. Is there any occasion for filing new tariff schedules unless there are changes?

Mr. HINES. Rarely, unless they want to put a tariff and all its supplements together and reprint it. Generally it involves some change in some rate; and I was just going on to say that all these traffic meet-

ings that are constantly being held, and these classification meetings that are constantly being held all over the country, are for the purpose of considering new conditions or conditions that had been overlooked at the time the rate adjustment had been fixed. Just to the extent that a rate-making tribunal acts on this matter, it draws to itself the administration and the decision of all those questions. So that the difficulties of administering this matter would increase in a most remarkable progression. Every time an adjustment is made, that brings so much more work to the Commission. When two adjustments are made it has got to manage both of them, in addition to considering all new cases.

In view of the extent of this country, and the complication of commercial conditions which affect railroad rates, I do not believe it is possible to exaggerate the conditions that would exist after a few years when the Commission had undertaken, as it undoubtedly would undertake, to prescribe various important rate adjustments on different commodities. There would be demands, almost day by day, for some change or some modification of some adjustment. The Commission, with its various duties, now finds it difficult to handle these matters with expedition. How much more difficult is it going to be when it is the actual and perpetual administrator of every rate that is made, and when the railroads can not meet new conditions as they arise, but must ask the Commission to meet them for them?

One of the glories of the commerce of this country, and one of the greatest advantages, the secret of the great and almost universal development of commercial and industrial enterprise, has been the flexibility and facility with which railroad men have met new conditions and have reached out after new markets, and have striven to help the localities on their lines to extend their trade. Rapidity is the secret of success in this direction, and you put a damper on all that when you say, "You must get the Commission to fix these changes;" and you will find that the new commerce will disappear and the people will forget all about it before you get the new rate fixed. This is a situation that has not been sufficiently dwelt upon, and I think that phase of the matter is one of such serious importance that it can not be dwelt upon too much. Appreciating as I have from my experience and from my connection with the railroads how these things take the time of the officers of the railroads in a single section, I believe I am perfectly correct in saying that one can not imagine the extent to which this would in a few years affect the commerce of the whole country, when these rates are made by this Commission. I do not mean that it should make them all at once, but when one is made—

Mr. STEVENS. Do you think those difficulties would apply to sparsely settled territory in new regions as well as to thickly settled territory?

Mr. HINES. I think they would be especially applicable there, because there is more new development there. Of course in old territory there are more different interests than in a new territory. These conditions perhaps offset each other. In a new territory you are making new adjustments to meet new conditions. In the old territory you are making new adjustments to meet new conflicts that are arising under old conditions. But the work is a continuing work, and is never finished.

The CHAIRMAN. The hour of our adjournment has arrived Will it suit you to go on in the morning, Mr. Hines?

Mr. HINES. Yes, sir.

Thereupon, at 12 o'clock, the committee adjourned until to-morrow, Thursday, January 19, 1905, at 10.30 o'clock a. m.

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THURSDAY, *January 19, 1905.*

The committee met at 10.30 o'clock a. m., Hon. William P. Hepburn in the chair.

The CHAIRMAN. Mr. Hines, you will proceed.

**STATEMENT OF MR. WALKER B. HINES—Continued.**

Mr. HINES. Yesterday I endeavored to point out to the committee a practical difficulty in the way of administering the rate-making power by any national tribunal, consisting in the fact that that tribunal would have to administer perpetually every rate or rate adjustment which it undertook to prescribe; that it was the experience of railroad people that no rate adjustment could be devised which did not when put in operation develop difficulties which had to be met, and that in the nature of things a railroad rate is a varying proposition and must be dealt with constantly in the light of existing conditions.

So that the more rates and rate adjustments the Commission undertook to make the more work it would be piling up for itself, in addition to the new work that would be coming on, and that considering the magnitude of the interstate commerce of this country and the difficulties the railroads now find in dealing with these questions it would in a short time be simply appalling—the amount of work with which the Commission would be confronted in administering the rates and rate adjustments already made.

Now, I wish to go on to one of the important economic aspects of the question. It is admitted on all hands that one of the important purposes of the proposed rate-making power is to give the Commission the right to regulate the differentials between different localities that compete and different communities that compete; that is, the prescribing of terms on which that competition shall be conducted. It has been thoroughly impressed, I think, on the gentlemen of this committee, as well as all others who have carefully studied the subject, that that competition between localities, between markets, between commodities, is the most vital and beneficial competition that can be found in this country or any country, and if it continues unabated there is a tremendous motive on the part of every railroad of the country always to increase the volume of its traffic, for that is the only way it can be sure of increasing its return or even retaining the average returns it has received in the past. So we find that railroads all along have striven, and are now striving, constantly to find new markets for the products on their lines; to find new markets for the trade centers on their lines, and to prevent any other trade centers getting ahead of those on their lines. This is the real competition that has caused the

progressive decrease in rates in this country, and it is a competition that keeps up every day in the year.

Mr. Staples very frankly said to the committee that his idea is that it is necessary for some Federal tribunal to decide these questions, and instead of allowing, for example, the railroads to the Gulf and to the Atlantic seaboard, respectively, from the grain sections of the West to strive for a division of the traffic and each one try to get as much grain traffic as it can for export, that he believes the public interest would be subserved by allowing some Federal tribunal to consider that question and to determine what the adjustments of rates should be, and consequently what traffic should go by one route and what traffic should go by another route.

It seems to me that there is a fundamental error in this proposition. It seems out of the question in a country that has developed as ours has developed, and is continuing to develop as ours is developing, to attempt to give any tribunal established by the Government the power to apportion the commerce of the country and say that this result of long rivalry between competing localities and the railroads that serve them is unwise, and that town A should have a little more favorable adjustment so it can get more of the traffic. Of course every time the tribunal decides a question of that kind, and decides in favor of the commerce of one locality, it is deciding against the commerce of another locality. It is not at all a question of deciding as against the railroads on the one hand and the public on the other, but it is a question of deciding between one portion of the public as against another portion of the public. And it seems to me simply preposterous to imagine that that would be advisable, or that there can be any necessity for such a radical departure from everything that we have regarded as safe governmental principles in this country.

Mr. TOWNSEND. May I ask you a question?

Mr. HINES. Certainly.

Mr. TOWNSEND. Is it not a fact that the question of the port differential, so called, relating to the ports of Baltimore, Philadelphia, New York, and Boston, for instance, has been a source of serious trouble with the railroads for many years?

Mr. HINES. Yes, sir.

Mr. TOWNSEND. And is it not a fact that they finally submitted voluntarily to the Interstate Commerce Commission the question to determine for them what it should be and agreed to abide by their decision?

Mr. HINES. My impression is that that is correct.

Mr. BOND. If you will pardon me—because that is in my territory—the cities themselves asked the Interstate Commerce Commission—

Mr. TOWNSEND. Did not the railroads agree to it?

Mr. BOND. The railroads said they would be very glad to have the Commission take it up.

Mr. TOWNSEND. And is it not true also that the Cotton Belt Railroad and the city of Memphis had the same difficulty and that that matter is now pending, by consent of the railroad and the other parties interested, before the Interstate Commerce Commission to determine.

Mr. HINES. I think that is correct also. But I would suggest to the committee in that connection that there is a vital distinction between submission, by an agreement not merely of the railroads inter-

ested but of the communities interested, to a particular tribunal that suits them and that they are willing to submit it to, and the Government saying that every such question may be submitted to a tribunal established by the Government against the consent not only of the railroads but of the interests involved. Arbitration is one thing and compulsory arbitration is entirely another thing, and it does not follow because some people submit some things to arbitration that all the commerce of the country shall be submitted to the compulsory arbitration of any governmental tribunal.

The point was raised here—and I think it was made clear to the committee—that any plan of apportioning commerce through the action of the Commission necessarily involves the plan of prescribing rates, and any way you look at it, if the Commission determines this question it will say, in effect, to some railroad or some community “You must quit getting as much of this commerce as you are now getting because somebody else ought to have it.” That will be a decision in favor of one part of the public against another part of the public, and unless conditions grow very much worse even than they ever have been it seems that individual initiative should be left to work out its own solution in commercial matters.

Of course when there is a controversy between a shipper on the one hand and the railroad on the other, I recognize that it is finally established in our theory of government that the parties are not on equal terms and the railroad must be regulated; but when it is a conflict between two sections of the public it is equally a theory of our Government that those two sections of the public shall fight it out and settle it for themselves, that this is not a paternal government, that this is not a government that dispenses prosperity to one or denies it to another or tells how prosperous one shall be or how much prosperity another shall give up; and as soon as you give the government the power to prescribe the adjustment of rates between two communities you do create that dispensing power and depart fundamentally from the theories of our Government.

As I said yesterday, one of the difficulties with the commerce of this country has been that there has been more independence and going ahead and developing every part of the country than could be found anywhere else in the world. That initiative has been made possible by the fact that a railroad, when it has found that traffic could be created or extended to other points, has gone ahead and made an adjustment to help out the communities on its line. “You can not have your cake and eat it too,” and if you say the Interstate Commerce Commission shall control this initiative you necessarily take it away from the railroads and you discourage the railroads from attempting to reach out and get new traffic, because they will realize what they do in that particular instance will be applied as a precedent in some other case, and that instead of simply developing traffic in that particular case they will simply be piling up precedents that will serve to disturb some other relation and bring the matter before the Commission and have its dispensing power extended still further.

Considerable reference has been made in the last day or two to the long and short haul clause. I may properly state briefly the exact effect of the present law. The courts have held that where the conditions of competition are substantially dissimilar at the longer distance

point and the shorter distance point it is no violation of the long and short haul law for the railroad company to recognize those conditions; but the rate to the longer distance point must be no lower than is necessary to meet the competition, and the rate to the shorter distance point must be reasonable. And the railroad company is not the final arbiter of whether these conditions are similar or dissimilar. The Commission can determine it in the first place. Its finding has prima facie force, and then it may go to the courts to say whether the conditions are similar or not.

Mr. Burr, of Florida, cited the case of less charges on freight to Jacksonville, say from the Ohio River, than to Tallahassee. It is obvious that the conditions of Tallahassee and Jacksonville are dissimilar. Jacksonville is on the Atlantic Ocean and has water transportation, and Tallahassee has not. Therefore Jacksonville always has had a substantial advantage, and always will have, in competitive conditions over Tallahassee, which is an interior point. If the rate charged to Tallahassee from the Ohio River is unreasonably high, there is ample provision for correcting that condition under the law to-day; and if the railroads voluntarily give a lower rate to Jacksonville than the conditions justify, that can be stopped under the law to-day.

Mr. TOWNSEND. Who is going to determine under the law to-day what the conditions justify?

Mr. HINES. The Commission can. They did it in the Social Circle case, and the Supreme Court affirmed its findings. That is one of its prime duties—to determine those things and enforce their findings.

Mr. STEVENS. As the law stands to-day is it left to the railroads to determine those conditions primarily?

Mr. HINES. They are bound to determine it primarily, and will continue to do so until the fixing of rates is left to some other tribunal.

The idea seems to be on the part of Mr. Staples and Mr. Burr that there should be an ironclad long and short haul clause, with the idea that the Commission could suspend it. That is what the Interstate Commerce Commission considered at the outset of its career, and in an elaborate opinion of Judge Cooley, in which I think the entire Commission concurred, the Commission announced that the adjustment of conditions between localities which would be thrown upon the Commission by that effort to say when the long and short haul clause should be suspended would be an enormous power in a single State and would be absolutely superhuman in the United States as a whole. And it is this power that the Commission condemned in that vigorous language which these gentlemen now urge be conferred upon that Commission. There has certainly been no change in conditions which would make that wise now when it was so unwise seventeen or eighteen years ago.

On the contrary, everything has tended toward an equalization, an improvement of these conditions. They have not been wiped out, because you can not legislate commercial conditions out of existence, but there has been a constant tendency to improve in that direction. The Commission has passed on numerous cases, and has decided that those conditions were not substantially dissimilar, and the railroads have complied with the orders of the Commission and put them into effect.

Mr. STEVENS. Supposing that ruling were put into effect, what would be the condition and result of such a law in moving corn, for example, or grain from points like western Iowa and Nebraska and South Dakota and that section?

Mr. HINES. I would not undertake to make a positive statement about that territory, because I am not familiar with the conditions.

Mr. STEVENS. I am speaking of the general effect.

Mr. HINES. But I will say that in the Southeast, where I am reasonably familiar with the conditions, one or two results would come about—either that the long-haul business would have to be given up and the markets reached by that traffic would be lost or very much restricted, or the short-haul rates would have to be so reduced as to bankrupt the railroads. The consequence would be that the Interstate Commerce Commission would be compelled to suspend that law. But the Commission has power to remedy conditions under the present law, and this power to suspend that is proposed is something that I can find no foundation for in any part of the history of the traffic of this country.

Mr. ADAMSON. Referring to the case where the rate to Jacksonville was cheaper than to Tallahassee, I presume the theory is that from most of the markets of the country it is actually cheaper to go by Jacksonville than by Tallahassee?

Mr. HINES. Yes.

Mr. ADAMSON. Then would it not be practicable to arrange exceptions in a general freight bill as to those places and as to particular commodities, when it is not cheaper to go by that route?

Mr. HINES. That is what the statute does now.

Mr. ADAMSON. There may be interior places from which traffic is moved where that theory would not apply at all?

Mr. HINES. Yes; it is possible, but not probable, because the commercial status of those two places is fixed by the enormous advantage which Jacksonville has; but if it did exist, as you suggest, the law would apply to it.

Mr. ADAMSON. If there was a carload of freight originating in the interior only a few hundred miles away, it would look like the railroad was charging for service it did not perform to charge the rate to Jacksonville and back to Tallahassee.

Mr. HINES. The question would be whether the rate to Tallahassee is per se reasonable. If not, it ought to be brought to the attention of the Commission. If the rate is reasonable (to the shorter point) and the rate to the longer distance point is no lower than it should be to meet the conditions, there is no violation of the present law, and it is impossible to see how that condition can be injurious.

Mr. ADAMSON. As a lawyer right there I would like you to go on record, if you are willing, with an opinion. If the lines to Jacksonville, by water or otherwise, are carrying freight there at a rate that is profitable to them, a rate they are willing to haul it for, do you think any judgment or order would be valuable requiring them, against their consent, over their objection, to raise that rate, because some other port or some other line could not do as well?

Mr. HINES. That is an untried field in Federal constitutional law, as to what could be done under those circumstances. Of course the theory—

Mr. ADAMSON. It will never be decided until somebody offers an opinion or tries it.

Mr. HINES. Of course, the theory of all this regulation for the purpose of deciding the comparative commercial importance of localities



is on the idea that you could increase one rate and thereby diminish the importance of that place if the rate to the other place is reasonable.

Mr. ADAMSON. These are not the same lines, you understand.

Mr. HINES. I understand.

Mr. ADAMSON. But there is one line going to New Orleans and one to New York. The line to New Orleans says it can make money and do business at a certain rate that is fair and reasonable, and it objects to changing it because the conditions are such that others can not make profits on the same rates. That states it squarely. Now, is it right, and would it be legal, constitutional, against the consent of that line to order them to raise that for the benefit of some competitor?

Mr. HINES. I can not get it into my head that Congress could pass a law that would directly give New York an advantage over New Orleans in that way, and I do not see how the same thing could be accomplished by indirection by delegating the power to a commission.

Mr. STEVENS. I would like to ask a question in that connection. Judge Prouty states in one of his papers that the rate on oil from Cleveland to New Orleans was 26 cents; the rate on oil from Chicago to New Orleans was 24 cents. At Cleveland there were independent refiners who sought the southwestern market. At Chicago was the Standard Oil Company, which practically had a monopoly running over that line. The Cleveland rate was fair and reasonable. The rate from Chicago to New Orleans was unfairly low because other commodities of the same character and class had the same rate between Cleveland and New Orleans and Chicago and New Orleans. So that the comparative rates on oil between Cleveland and New Orleans and Chicago and New Orleans were unfairly low as regards Chicago and New Orleans. Now, what could be done under the present law, conceding that condition exists?

Mr. HINES. Under our present law the Commission could prevent the charging of more than a reasonable rate from Cleveland to New Orleans.

Mr. STEVENS. But it is conceded that that is a reasonable rate—that 26 cents is a reasonable rate—and the other is unreasonably low. How would you remedy that discrimination?

Mr. HINES. If some railroad that runs from Chicago to New Orleans establishes that condition, I do not see how it can be remedied, and I do not see why anybody would want to remedy it. If some railroad running from Chicago or New Orleans establishes that condition, and is willing to carry the business for a lower rate, that certainly is an advantage that Chicago ought to have,

Mr. STEVENS. Now, conceding that the article is competitive with oil—for example coal, or anything of that sort that would be competitive with oil—and that that article has the same rate between Cleveland and New Orleans and Chicago and New Orleans; the result would be then that there would be a monopoly of oil over every other competitive article and a monopoly of the Chicago market over every other market owing to those conditions. Now is not that discrimination?

Mr. HINES. If the traffic conditions are such that oil can be and is carried from Chicago to New Orleans for less than other competitive commodities are carried from Chicago to New Orleans it is entirely probable that as a matter of fact the Commission could find, and could

sustain its findings, that it would be unjust discrimination on the part of the railroad from Cleveland to charge more for oil than it does for competitive commodities from Cleveland.

Mr. STEVENS. But it is conceded that charge from Cleveland is a fair, just, and reasonable charge, not only as to oil, but competitive commodities; it is conceded that as to the other competitive commodities the charge from Chicago to New Orleans would be the same as from Cleveland. Oil is the one single exception.

Mr. HINES. If from a traffic standpoint oil may be an exception at Chicago the Commission might find that to be a basis for dealing with the carrier from Chicago to Cleveland; but if there is a railroad from Chicago to New Orleans that does not go to Cleveland and is not responsible for conditions at Cleveland, and it is willing to carry oil for less than a reasonable rate, whereas that is not true at Cleveland as to the railroads there, that is simply the advantage Chicago has. It may be that the refiners at Chicago are owned by the Standard Oil Company; but if you enforce the law against rebates it gives everybody else the same opportunity to establish a refinery there. It gives Chicago the benefit of its favorable location.

Mr. STEVENS. Right there, then, you concede that carrying oil from Chicago to New Orleans at less than a reasonable rate would be a discrimination against other competing commodities that ought to be carried at a reasonable rate and are carried at a reasonable rate?

Mr. HINES. That is on the same railroad; yes, sir.

Mr. STEVENS. How are you going to remedy that discrimination, then?

Mr. HINES. If it is on the same railroad, declare that that is an unreasonable discrimination.

Mr. STEVENS. What would you provide to equalize conditions?

Mr. HINES. Do you mean as respects Cleveland?

Mr. STEVENS. No; as respects Chicago. Supposing that competitive articles with oil were carried at a reasonable rate from Chicago to New Orleans; that oil was carried at an unreasonably low rate; how would you equalize?

Mr. HINES. The Commission could declare that that was an undue discrimination and order a discontinuance of that rate.

Mr. STEVENS. In what way?

Mr. HINES. Just that the railroad is ordered to cease and desist from charging a lower rate on oil than on other commodities.

Mr. STEVENS. And that means they have to increase the rate?

Mr. HINES. One or the other, either increase one rate or lower the other rate.

Mr. STEVENS. A condition might occur by which they would have to increase their rate?

Mr. HINES. Certainly.

Mr. STEVENS. That is what I wanted to know.

Mr. ADAMSON. If conditions are such that without dishonesty or improper purpose that rate is a profitable and desirable rate to the line that makes it and acts on it, is it really a discrimination for it to establish that rate to which its energy or nature or the situation entitles it? Would it not be just as much discrimination for a woman to be by nature prettier than other women?

Mr. HINES. I would like to make myself clear on that. What I intended to say to Mr. Stevens was this: If the A. B. railroad from

Chicago to New Orleans charges a lower rate on oil than it charges on other competitive commodities, whereas the conditions are such that the rates ought to be the same, and there is no reason why oil should be lower, that is a discrimination on the part of that railroad as between those commodities; but no matter how low a rate the A. B. railroad charges from Chicago to New Orleans on oil that is not a discrimination against Cleveland, where another rate is maintained on oil by another railroad. That is a natural or acquired advantage which Chicago has and is entitled to.

Mr. ADAMSON. Has not a man or a corporation a right to the business at any rate which it finds profitable, that it can get by certain rates?

Mr. HINES. I think it has, with this qualification, of course, in the case of a railroad, that it is a quasi public corporation, and the railroad has not quite the right to make discrimination between points on its own line and give one point an advantage at the expense of another point on its line. But if a railroad gives every point on its line an advantage over every point on another line, that is simply the natural advantage of the points on its line and is no discrimination against any other railroad, and you might as well issue an injunction against exceptional progressiveness and enterprise on the part of the Board of Trade of Chicago, so as to equalize with Cleveland, as to say that the railroad running from Chicago shall not give the shippers from Chicago any advantage over the shippers who use the railroad from Cleveland.

Mr. RICHARDSON. I will call your attention to something outside the through long haul. You are familiar with the rates of the Louisville and Nashville Railroad, are you?

Mr. HINES. Fairly so, yes; as far as I had occasion to investigate them.

Mr. RICHARDSON. Well, can you give me any reason why there should be a marked difference in the freight on a commodity from Huntsville, Ala., to New Orleans, and the rate from New Orleans back to Huntsville; is there any reason why there should be a difference in the freight charges?

Mr. HINES. Why, Judge Richardson, there are numerous reasons that might call for that. I will mention an illustration that perhaps will put it in concrete form from one standpoint. The Florida railroad commission, which has the power to make classifications, made some changes in the Louisville and Nashville classification, and it put molasses in the commodity class. The reason for that was that the stations along the Louisville and Nashville Railroad in Florida—that is, the farmers along there—made molasses and wanted to get it to market, and the commission's idea was that a low rate ought to be given to encourage that. Well, we went to the commission and explained the situation to them. We said, "The only place these people ship molasses to is Pensacola. That is their only market, and we already have commodity rates in there lower than the new rate you have prescribed, and the rates you have prescribed take molasses out of the class it has been in, the fifth or sixth class, along with other groceries. When a man ships a can of molasses from Pensacola there is no reason why that should be carried at a lower rate than coffee or sugar or rice or other things of the same class with it, which are also

moved in small quantities. Now you let molasses stay where it is as a grocery commodity and we will maintain a rate lower than you have asked us to put on molasses to market." A railroad will make a low rate on freight to allow it to find a market with the hope that it will move in large quantities, when it may properly maintain a higher rate in the opposite direction. Another thing to take into consideration is the necessity oftentimes of hauling back empty cars. In one direction the cars may be moved full of freight and in the other direction may be empty. So a railroad can often give a rate to encourage the loading of its empty cars when it could not afford to give the same rate in the direction in which its cars are already moving filled.

Mr. RICHARDSON. Do you think that difference, for the reasons you have given, should be 100 per cent?

Mr. HINES. That would depend, Mr. Richardson, on the commercial conditions. Taking molasses, if the rate on sixth-class groceries was a reasonable rate, there is no reason why molasses when carried from a wholesale house should be carried at any less rate. If a rate just half that was necessary to develop the industry of the production of molasses on that road, and it was not so low as to inflict an actual loss on the railroad company, it would be proper to make that low rate.

Mr. RICHARDSON. What do you think of this proposition: The freight charge on a horse from Huntsville to New Orleans was \$29.87. To ship the same horse back the freight charge was less than \$15. How could you explain that?

Mr. HINES. I could not without the facts.

Mr. RICHARDSON. I am giving you the facts.

Mr. HINES. I mean the reasons for those rates. Every rate has a reason, and there may have been a good reason for the difference there. On the other hand, it looks as if there was too much difference.

Mr. RICHARDSON. Don't you believe that that is too much difference?

Mr. HINES. I was going to say that if that does exist—and I know it does from your statement—and if there is no reason for it, the Interstate Commerce Commission ought to declare under the law that the rate should be the same both ways.

Mr. STEVENS. If it were called to your attention, as traffic manager of a railroad, what would you do?

Mr. HINES. Change the rate if there was no good reason for the difference. Where there are no special conditions affecting the question the rate should be equal each way. I have found from my experience in the railroad business that there are a great many things necessarily arbitrary. But generally speaking, there is nearly always some colorable reason, I believe, for all those things, and generally a good reason. Sometimes the reason may be bad and the rates ought to be changed; but they can be changed under the present law.

Mr. RICHARDSON. And you believe that when instances of that kind are called to the attention of the railroad companies that they would change them?

Mr. HINES. I think so, and if not the Commission can change them under the present law.

Mr. RICHARDSON. Where they ought to be changed.

Mr. HINES. Yes, sir. I will hurry along.

Another branch in the matter is no doubt fully agreed to by you gentlemen, which is this. That while the business of the railroad is a

quasi public function and is subject to whatever regulation is necessary to protect the public, yet the public has elected to allow railroads to be built by private capital, and has not undertaken to furnish the capital or any guaranty against the vicissitudes of commerce, and every railroad must take the risk of bad times, which are bound to come, and suffer all the losses that may occur from any cause, and certainly it is a very delicate subject when you come to reduce radically or make it possible to reduce radically the revenue that a railroad company receives.

Of course, if it receives too much it ought to be reduced, but a conservative rather than a radical method ought to be adopted. And it should be borne in mind that while a railroad might make a favorable showing in good years, that is no guaranty that it will make any showing above operating expenses in bad years, and that it is entitled to get a return in good years which will tide it over the bad years. That while unreasonable and extortionate rates can be and ought to be prevented, yet that there is no reason in the world why you should attempt to hold a railroad company down to four or five or six per cent on its actual investment in good years, because in bad years they may not get anything; and the real issue is, Is the rate extortionate and oppressive? If so, reduce it. Is it unjustly discriminatory between points on the same line? If so, stop it. But within those limits allow the railroads to share in a reasonable degree of prosperity of the times and to prepare for the times when they will have to go without any returns whatever above their operating expenses.

It is apparent from what has been said to this committee that the tendency always on the part of a rate making governmental tribunal is to reduce rates. They may have to raise them at times to preserve the adjustment between localities, but the general tendency will be to pull rates down and leave only a small margin of profits. And that will be the case in prosperous times; and when times get bad, when business falls off, everybody knows that a Government tribunal will be extremely reluctant to raise those rates. It will resolve every doubt against the railroad. The consequence is that there will be a constant downward tendency, more than is necessary to protect the public, that will in the end be a serious handicap upon the railroads in this country. It will prevent them from paying the wages that they can pay when times are good. When times are good the Commission will be pulling rates down a little, making their margin of returns narrow. Times will get bad, business will fall off, and the railroads themselves will have to reduce the rates to get any business. And then when times get good the men want more wages, materials will cost more (nobody can prevent material costing more in good times), and then there will be a situation that no Government commission can be expected to deal with.

Now, if that was the only way in the world to prevent a great public evil, of course the railroads ought to suffer that disadvantage; but if there is another way, if there is any conservative, safer ground where you can protect the public, and at the same time not put upon the railroads this constant incubus of pressing the rates down all the time with almost no hope of getting them up in the event of there being sufficient reason for their being raised, then a conservative rather than a radical method ought to be adopted.

Mr. ADAMSON. Is it not fair to assume that railroads in most instances, where they promulgate a rate, have made one satisfactory to themselves?

Mr. HINES. You must take into consideration all the conditions under which they have promulgated a rate.

Mr. ADAMSON. When you find one abnormally low it is the result of a rate war, is it not?

Mr. HINES. Generally; but a rate that is put in very low, provided it is over the actual cost of moving the business over the line, is a good thing for the public and a good thing for the railroads. It may be a temporary condition that enables the railroad to do that, and when that temporary condition is over it cuts out the rate.

Mr. ADAMSON. It is not intended for a permanent rate?

Mr. HINES. No; it is simply to meet that temporary condition. And if the power is given to a commission to fix absolutely the rates that shall be charged, there is something that the railroad always has before it to discourage its meeting special needs at special times by making reductions, because it will know that the Commission will seize hold of that rate and say that that proves that is a reasonable rate; and it will be used elsewhere; it will be a handicap upon the facility and flexibility of railroad rates now by which special needs are met by special rates. I mean that a railroad under special conditions will establish a very low rate to cope with the special commercial situation. That rate is published; it is filed with the Commission; it is open to the Commission at once to inquire, "Is this right? Is this a discrimination against anything else?" If it is wrong the Commission can stop it; but if it is not, let it go on, and then when the conditions change the railroad can take that out, and it is not erecting a standard which will be a criterion for all rates.

Mr. STEVENS. Suppose you make an abnormal rate and continue it for any purpose of your own motion, or perhaps it is done by the Commission, or in some other way. What is the effect in the course of time for furnishing facilities to the public, in the way of depot facilities, track, equipment, train facilities, and one thing and another? Does that make any difference?

Mr. HINES. The low rate of course encourages business; it is generally put in for that purpose; and then facilities have to be provided.

Mr. STEVENS. So the public would not suffer in the low rate so provided?

Mr. HINES. The railroad would suffer.

Mr. STEVENS. I supposed so; but would that have any reflex action on the public?

Mr. HINES. Necessarily it would in the long run.

Mr. STEVENS. In what way?

Mr. HINES. That is the tendency, to reduce rates. It is the tendency of every commission, and the only reason that it has not had a greater damaging effect upon the railroads is that 75 or 80 per cent of their business is interstate business, and the State commissions can not touch that. Then you do in the long run hamper the railroad and prevent them from furnishing the character of facilities and the quantity of facilities which the public would want. You do that by lowering rates.

Mr. STEVENS. Why?

Mr. HINES. It would not have the money to buy them; it would have to cut down its operating expenses; it would have to cut down everything. So the public is interested in having the railroads receive a fair or even liberal profit on their investment.

Mr. STEVENS. Could you not give them as many passenger trains as they need with the increased business which would come by reason of the lower rate?

Mr. HINES. If we made the money, it would pay for itself; but if the low rate, which does increase business, is made a criterion to make low rates in other cases where no business is brought by reason of the low rate, there would be an impairment of the railroad revenue, and it would not be able to serve the public adequately.

Mr. STEVENS. Would that impair the condition of the rolling stock and depots, and so on?

Mr. HINES. Necessarily it would. In times of depression the railroads have to diminish their expenditures for these things; they have to diminish all expenditures, they have to cut down wages. When times are good they spend more on these things and pay higher wages. They have to adjust those things to commercial necessities.

Mr. MANN. With reference to the case that was involved in the Maximum Rate case, the distance from Chicago to Atlanta is 588 miles; from Boston to Atlanta, 912 miles, or 324 miles farther. The rate on one class from Chicago to Atlanta is 71 cents (the shorter distance) and on the same class from Boston to Atlanta it is 60 cents. Now, of course, I understand that the reason of that is because of water transportation.

Mr. HINES. Yes.

Mr. MANN. But if the rate from Boston to Atlanta by rail at 60 cents for the 912 miles is profitable, should not some one have the right to say whether the railroad should require 71 cents to carry similar freight 588 miles?

Mr. HINES. The Interstate Commerce Commission has that right now. If that rate is unreasonable in itself it can declare it so and order its discontinuance.

Mr. MANN. They have the right to declare the 71 cents rate unreasonable and order its discontinuance?

Mr. HINES. Yes.

Mr. MANN. But the claim is made that that course would involve litigation to the Supreme Court of the United States, which would require several years to dispose of, and at the end of that time if the Commission was sustained the railroad might say that the rate should be 70 cents from Chicago and 59 cents from Boston, leaving the condition in discrimination exactly the same.

Mr. HINES. That claim is incorrect. I had intended to take that up a little later, but I will be very glad to take it up now, take up the status of the present law and take that case as an illustration.

Mr. LOVERING. Are those actual rates, Mr. Mann?

Mr. MANN. Yes.

Mr. LOVERING. On the same class of goods?

Mr. MANN. On the same class of goods.

Mr. HINES. Take that case as an illustration. It deals simply with the reasonableness of the rate from Chicago to Atlanta. The theory presented by the interstate-commerce act was that the courts should

prevent the continuance of unreasonably high rates. The Commission was not created as an independent tribunal to dispose of this question itself. It was simply an auxiliary to the court, to get up the information and make out a *prima facie* case. It was believed to be a valuable auxiliary. Now, if the Commission investigates that case, and finds that that rate is unreasonably high, it can enter an order that the carriers shall cease and desist from charging that rate. It can file a petition in equity in the circuit court. It can fix the time in which that order is to be obeyed, and if it is not obeyed in that time, ten or twenty days, or any other time the Commission fixes—that is my recollection—it can file a petition in the circuit court.

The expedition act, passed in 1903, provided that the Attorney-General can certify that a case under the interstate-commerce act involves a matter of public importance, and the act requires that that must be heard as soon as practicable before three circuit judges. The Elkins Act applies that provision to cases brought by the Interstate Commerce Commission. If the court believes that that rate is too high it can issue an injunction at once. It can do it in thirty days after the case is brought before it, or two months, or whatever time is possible, in view of the fact that the law says that it must be done as soon as practicable.

Mr. MANN. Right there, would that injunction order remain in force?

Mr. HINES. I was coming to that. When that injunction is issued the carrier can appeal directly to the Supreme Court. The appeal does not suspend the going into effect of the injunction. The circuit court decides that question, and if the circuit court, composed of three judges, says, "We believe that the public interest will be more subserved by suspending this injunction pending this appeal than by letting it go into effect," it seems to me that is a reasonable protection to the public. On the other hand, if the court says, "We are so clear that this is unreasonable that this injunction ought not to be suspended," it will go into effect at once, and no appeal by the carrier and no delay by the carrier can postpone for a single day the going into effect of that injunction.

Then we come to the other point. The claim is made that the railroads would make simply a technical compliance with that provision. Now, the interstate-commerce act has been in effect eighteen years, and not a single instance can be cited in that time where any railroad has undertaken to comply in that technical sense with the order of the Interstate Commerce Commission.

In reading Mr. Bacon's argument before the committee the other day I saw it stated that he would file a memorandum of cases which he understood were cases of that character. I have not seen that memorandum, but I feel perfectly safe in saying that Mr. Bacon has been misinformed on that point. I do not know of a single case, and I do not believe there is one; and from what I know of the railroad companies and from my own experience I know that when a circuit court of the United States issues an injunction and says that a certain rate is unreasonable that that necessarily carries with it some light as to what the circuit court thinks should be done in order that the law be substantially complied with, and while it has the advantage of not fixing an ironclad rate which the court must administer for the future, it leaves the railroad where it can and where it will substantially comply with that order and make a substantial reduction in the rate.



There is one other procedure I want to refer to there. In March, 1903, I think it was, or at least early in 1903, the Supreme Court held that under the Elkins Act any complaint of discrimination between localities (of course that means by a single railroad, because the present act does not undertake to keep one railroad from doing more for its communities than another railroad does for its communities), any discrimination in tariff rates between communities could be made the subject of a bill in equity in the first instance without going to the Commission at all. The Commission can make a summary investigation; that is, announce that on the face of the tariffs they are unfair. It can tell the district attorney to bring suit at once and have the investigation in the circuit court, thus saving the time necessary for an investigation by the Commission.

That is another way delay can be avoided; and I wish to say again, and to say with emphasis, that there is no case in my opinion where a circuit court would enter an injunction in a case of that sort that it would not be substantially complied with by the railroad company. Now, at any rate, a thing of that sort ought not to be left to the jury. I say that that is a conservative method of railroad regulation and when it has not been proved inefficient it is unwise to confer the rate-making authority.

MR. MANN. I would like to ask a question on that same line. Is it your judgment as a former traffic manager and railroad attorney that if a merchant of Chicago should file a petition with the Interstate Commerce Commission, alleging that the rate from Chicago to Atlanta was too high, that the Commission on hearing would order the railroads to cease and desist from charging that rate?

MR. HINES. It has that power.

MR. MANN. And if that order was upheld by the court that those railroad companies would make a substantial reduction of the rate?

MR. HINES. I am satisfied of it.

MR. MANN. Has any such petition, so far as you know, ever been filed with the Commission since the Maximum Rate case was tried?

MR. HINES. I am not advised of any.

MR. TOWNSEND. That question was along the same line of a question I would like to ask. Do you claim that the Supreme Court has ever directly held, where the question was raised, that this Commission had the power to declare a rate unreasonable?

MR. HINES. Yes.

MR. TOWNSEND. In what case?

MR. HINES. In the Chicago Live Stock Yards case.

MR. TOWNSEND. Did they hold that in the Maximum Rate case?

MR. HINES. That question was not presented there.

MR. TOWNSEND. Did not Judge Brewer in that case specify what were the powers of the Interstate Commerce Commission?

MR. HINES. He did not undertake to specify all of them, but he did specify numerous powers.

MR. TOWNSEND. And he did not include this one, did he?

MR. HINES. I do not recall that he did. He did say that they had the power to prevent unjust discriminations.

MR. TOWNSEND. Will you tell me again what that case was?

MR. HINES. Yes; I will explain the situation. That was the case of the Interstate Commerce Commission against the Chicago, Burlington and Quincy Railroad and other railroad companies, involving a termi-

nal charge at Chicago on live stock from the Southwest. The Commission held that that rate was unreasonably high and ordered the carriers to cease and desist from charging it. The point was made on demurrer that the Commission did not have that power, that that was in fact making a rate indirectly for the future. The circuit court overruled that demurrer and held that the Commission did have that power. On final hearing in the circuit court the circuit court held, on the facts presented, that the rate was reasonable.

The case went to the circuit court of appeals and was affirmed on the facts. It then went to the Supreme Court of the United States, where it was thoroughly argued, and the court pointed out that the Commission had held the terminal charge unreasonable because it was added to the rate previously in effect, which had theretofore covered the terminal service, and was presumptively reasonable compensation for the transportation, including the terminal service; that the Commission had justified itself on that ground, that it was an addition to a reasonable rate already in effect without any addition to the service; and it appeared that after that order was made it had been made to appear to the Commission that on a very large part of that traffic there had been a reduction on the through rates of about \$16 per car, and the Commission had refused to modify its order, holding the \$2 terminal charge unreasonable.

Now, the court said that the Commission reached its conclusion only on the ground that the through rate was reasonably high and included the terminal charge; so that theory clearly could not apply where there had been a reduction in the through rate, much greater reduction than the \$2 terminal charge amounted to; and it reversed the case, not because the Commission did not have power to make an order to cease charging an unreasonable rate, but because of the refusal of the Commission to consider those material facts. However the court reversed the case with the power to reopen it and make an order based on those facts; and the Commission has that case before it now.

So, I say, that case establishes the proposition that the Commission has the power to order the discontinuance of a rate that is said to be unreasonably high.

Mr. TOWNSEND. Where is that case?

Mr. HINES. The Interstate Commerce Commission against the Chicago, Burlington and Quincy Railroad.

Mr. BOND. 186 U. S., 330.

Mr. HINES. That is the Supreme Court report.

Mr. BOND. Yes.

Mr. HINES. I was looking for reference in the Federal Reporter.

Mr. BOND. 98 Federal, 173.

Mr. HINES. Yes; that is the one in the Federal Reporter.

Mr. MANN. They have exercised that power in a few recent cases, have they not?

Mr. HINES. The Commission has exercised that in a number of cases, and in a number of them it has been substantially complied with.

Mr. MANN. There has been a case in the past year, the case of the rate of fruit from New York to Chicago, fruit coming from the South.

Mr. HINES. Yes, sir. It was exercised in that case, and I wish to refer to that case. The Commission there held that the rate from New York to Boston on peaches was unreasonably high and ordered the discontinuance of that rate. The rate was \$80 a car. The Com-

mission suggested in its order that \$50 a car would be a reasonable rate. The railroad company reduced the rate to \$65 a car. Now, the Commission had fully investigated that matter, had all the facts before it, and it was open to the Commission the day after the railroad company reduced that to \$65 to have a summary hearing or to bring a suit in the circuit court, without hearing, and ask for a further reduction in the rate if they did not think it was reasonable. I take it that the fact that the Commission has acquiesced in the \$65 rate is due to the belief that they could not sustain the position that the \$65 rate was unreasonable, because, if they believed they could, the way was open under the present law to do it.

Mr. MANN. Upon that point, Mr. Hines, with regard to the question of construction, is it not provided by the statute, and is it not absolutely plain, that the Interstate Commerce Commission is given the power to order a railroad company to cease and desist from charging an unreasonable rate?

Mr. HINES. That is the express language of the statute.

Mr. MANN. Is it not as plain as language can be written?

Mr. HINES. Yes. And it is made the duty of the court to enforce those orders unless they are unreasonable or unlawful. I can not escape the conclusion, gentlemen, that the power of the Commission under this rate-making grant of authority that is being discussed can not possibly be exaggerated. Their power over the earnings of the railroads and over all the capital invested in the railroads is almost absolute. The power they are given over the commerce of the country and the apportionment of that commerce is, it seems to me, absolute. And I understood from Mr. Staples, who was very frank about it, that that is what he thought there should be; that there ought to be a tribunal with that power.

In view of that tremendous power, I think it can be properly said that it would have more power than any other tribunal in this country; that it would have more power than could be imagined. And in that connection I would ask you to consider that a majority of that Commission can be appointed by every President that is in the White House for four years or, in fact, for a little over three years. A majority of them are appointed every three years. So at any time, if a President of radical tendencies should be in the White House, he could change the character of that Commission and change the whole financial and commercial situation of this country so far as railroads are concerned. Now, if that were necessary in order to prevent some overpowering abuses, perhaps the risk ought to be taken. But the point I wish to make is that it is not necessary, because no such abuses exist, and the abuses that do exist are fully susceptible of correction under the laws that exist.

Mr. RICHARDSON. Do you think that the enforcement of the present statute is in all respects sufficient to protect the interests of the public and the interests of the railroads?

Mr. HINES. There has been absolutely nothing to show it is insufficient. If there are any amendments needed to increase that efficiency along the lines of the present law, that is all right; but you have simply got that distinct line of cleavage before you. Here is one method of corrective regulation by which you can substantially prevent any oppressive or unjust action on the part of the railroad and at

the same time leave a reasonable degree of initiative and the management of railroad affairs for the future with the railroads. With the other you have a system of affirmative regulation for all time to come of every rate that the Commission takes hold of.

Now, if there is anything that can be done to increase the corrective power under the present theory, of course there can be no dispute as to the propriety of that, because that theory of regulation has been fully adopted by Congress. But the question before the committee now is whether that theory will be thrown aside and the theory of affirmative management of railroad properties adopted in its stead.

Mr. RICHARDSON. The real question now, as I understand, is to give the Commission effectiveness—that is, to give it power to enforce legislation that already exists.

Mr. HINES. That can be done. That is already provided for in the present law.

Mr. TOWNSEND. You have shown that you have made a careful study of this and I ask this question for information. The Commission during the first years of its existence exercised the right of rate making. The first order or two it made were with reference to the establishment of a rate, were they not?

Mr. HINES. It made a good many rates.

Mr. TOWNSEND. During that time can you recall any instances where the Commission abused that right and brought about any conditions of which you are complaining now?

Mr. HINES. I think it will be found on investigation that certain rates the Commission made were not observed by the carriers because they did not believe the Commission had the power, and the Commission did not take it to court.

Mr. TOWNSEND. Was that ever questioned in any court trial up to the Maximum Rate case?

Mr. HINES. It was questioned in a good many court trials before that. In a case against the Lehigh Valley Railroad, in 1891, and in a case against the Louisville and Nashville Railroad, in 1893, the point was made.

Mr. TOWNSEND. And how was it disposed of?

Mr. HINES. In favor of the railroad in the Louisville and Nashville case, in 1893. That went to the court of appeals and was affirmed. That was the Social Circle case. Then it went to the Supreme Court and was affirmed in 1896. Some sweeping orders were made with which the railroad did not comply. My information is that in 1890 the Commission issued an order reducing the rates on grain to eastern points. My information is that that order was not complied with, and the Commission did not file any proceedings to compel compliance. That was in 1890.

Now, coming more directly to an answer to your question, I say this was rather a progressive thing, naturally. Take a tribunal, assuming that it has this power, it has a disposition to start out cautiously, especially when the power is not directly granted by the statute. I say that that Social Circle case was an abuse of that power. The Commission held on the testimony of a single witness, who said that a rate of \$1.01 would be a reasonable rate from Cincinnati to Atlanta, that instead of \$1.07, the existing rate, that the rate should be reduced to \$1; and it made an order that the first class from Cincinnati to

Atlanta should be \$1. That would have pulled down the rate from every point on the Ohio River to Atlanta and every other basing point in the South, and would have made a reduction of 7 cents on all traffic moving from the Ohio River to basing points in the Southeast.

One witness expressed the opinion that a rate of \$1.01 would be proper; a good many railroads in the South were in the hands of receivers and unable to pay fixed charges, and yet that reduction to \$1 was made. And in the Maximum Rate case very substantial representations were made by southern railroads that it would bankrupt them to have to put those rates into effect.

Mr. RICHARDSON. Who were the Commissioners?

Mr. HINES. I do not know.

Now, going to another point. In its last annual report the Interstate Commerce Commission points out that it is proper for it to exercise its rate-making power, because the proceeding in which it would do it is essentially judicial. It says there must be complaint and notice and full hearing. I wish to point out to the committee, with all due respect to the Commission, that while the form and character of the proceeding may be judicial the form and character of the tribunal is not judicial. The Interstate Commerce Commission is charged with a great many important duties that are utterly inconsistent with the exercise of any judicial function. It is its duty to seek out and prosecute for every violation of the Elkins Act or any other secret concession from a rate.

It necessarily, in that respect, must occupy the attitude of a detective and a prosecutor. It is perfectly proper for it to do it. It is its express statutory duty to do it. It has to perform such duties in respect to safety appliances on railroads through its detectives or inspectors who are traveling all over the United States and searching out violations of that law, and where car couplers do not come up to the requirements of the act, and where trains are not equipped with air brakes so as to comply with the act, it is its duty to institute prosecutions against the railroads. That is entirely within the statute requirements, and somebody has to do it.

There is no complaint that that is not a proper exercise of the duty of the Commission. We find them having monthly accident reports from the railroad companies all over the United States which enable them to say what the cause of the accident was, to see if the railroads were in fault, and to see how the matter can be corrected, and of course a great deal of very valuable information is gotten together in that way. We find it instituting complaints before itself; and that is proper. It is supposed to represent the shippers. That is what it was created for. It institutes these complaints and is avowedly the shippers' champion in these matters. The idea is that the interest of any particular shipper is so small as compared with the railroad interests on the other side that the shipper needs the aid of a Government tribunal to assist him in his case against the railroad company. Nobody denies the propriety of that.

But the point that I make is that a tribunal properly charged with detecting violations of the rebate law and prosecuting those violations, and detecting violations of the safety-appliance law and prosecuting on them, and charged with the duty of scrutinizing all the railroad accidents in the country and supervising those matters, and calling attention to all cases of improper management on the part of rail-

roads, and acting as the champions of the shippers, and appearing as a party complainant with the shipper, and appearing as the attorney of the shipper, has not a single vestige of the judicial character about it. It is no reflection upon the court or on the gentlemen who compose the Commission. It is simply putting into effect the principles of republican government that any body who exercises those functions can not be judicial.

Judge Crump, from Virginia, of the Virginia Railroad Commission, very frankly stated to you yesterday how his commission was organized. They had to make a new constitution in Virginia to do that. It has the constitutional privilege of exercising the legislative, judicial, and executive powers. Judge Crump, for whom I have the highest respect, said to you that he thought that was proper. He was very frank about it. Of course if that is proper it means that the principles of republican government, on which this country has been conducted, need revision.

Now, it has always been said that a benevolent despotism is the best form of government, and I am sure that Judge Crump is a very benevolent despot; but the point I make is that it is improper to provide for a tribunal of that sort, and to give to it these inquisitorial and prosecuting duties, and to give to it also any duty that calls for a judicial proceeding or calls for the judicial temperament. The Commission recognizes the propriety of the judicial attitude toward these things by making that an argument; and I say with all respect that no tribunal could be imagined that could be further from being judicial in its form than the Interstate Commerce Commission, charged as it is with these other duties so important to the Government, and which need such vigilant, unrelenting attention to secure their full enforcement against the railroad companies.

Mr. TOWNSEND. You favor the establishment of a special court?

Mr. HINES. I say that if anything of this sort is established it certainly should not be vested in a body that has these functions. It ought to be a separate tribunal and not charged with any of these functions.

Mr. RICHARDSON. Is your argument along the line that the railroads themselves ought to have the entire power of making rates?

Mr. HINES. No, sir; they ought to be regulated. I say they ought to be regulated.

Mr. RICHARDSON. By whom?

Mr. HINES. By the Government. They can be regulated now by the courts at the instance of the Interstate Commerce Commission.

Mr. RICHARDSON. By act of Congress, or by the courts, or by the Commission?

Mr. HINES. I say they can be regulated now.

Mr. RICHARDSON. I am asking you for your idea. You are very well informed about it. Should it be by act of Congress, or by the Commission, or by a court?

Mr. HINES. You have necessarily to have an act of Congress, of course. They can not be regulated by an act that will apply to all conditions. You have to make a law and then provide a tribunal to enforce the law. My idea is that these duties of the Commission are proper; they ought to hunt out these violations and then enforce the law, but they ought not to do that themselves, and it ought not to be assumed that they are capable of discharging these judicial functions

when they have these other functions to perform which are so incompatible with the judicial functions.

Mr. ADAMSON. You think the judicial functions ought to be disassociated from the operations of inspection and prosecution?

Mr. HINES. Yes; and I think anything that requires a judicial attitude ought to be disassociated from these other duties. They are all important duties, and it is inconceivable to me how they can be centered in one person without interfering with the judicial attitude which the case requires.

Mr. RICHARDSON. Do you think that the interstate court—the judicial court, I mean—should be clothed with the power to say absolutely and unqualifiedly what a rate should be?

Mr. HINES. No, sir. My idea is that at least until the present law is found inadequate there should be no tribunal erected to make and regulate the railroad rates of this country.

I say that the law now in force should be enforced, and I think it would be adequate. I do not mean that ideal conditions would be produced, because no condition is perfect, but I mean that there would be a substantial correction of every traffic abuse that exists as far as any law of any sort can be enforced.

Mr. RICHARDSON. As I understand your answer, it is based on the idea that a judicial body, a court, ought not to be clothed with the legislative authority.

Mr. HINES. I do not think you can clothe a court with legislative authority. You might call it a court, but it would not be a court; in the nature of the case it would not be. It might be constituted as a court, but it would not be if it had legislative authority. I say that the Commission plan calls, and the Commission recognizes that it calls, for the judicial attitude, and that that can not be expected where these other functions are combined with it.

The CHAIRMAN. If you can finish in the morning, Mr. Hines, we will let you occupy twenty minutes in the morning.

Mr. HINES. Very well, Mr. Chairman.

(Thereupon the committee adjourned until to-morrow, Friday, January 20, 1905, at 10.30 o'clock a. m.)

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ACTION ON THE INTERSTATE-COMMERCE LAW BY THE NATIONAL BOARD OF TRADE,  
JANUARY 18, 1905.

The National Board of Trade, believing that the interests of the people demand not only that rates of transportation should be reasonable and that there should be no unjust discriminations or preferences, but also that there should be a more effective governmental supervision of all transportation agencies, expresses the earnest hope that Congress will in its wisdom, and as speedily as possible, enact such legislation as will with justice to all interests concerned secure a more speedy and more effectual correction of any abuses in transportation methods or operations which may, upon due inquiry, be found to exist, and to that end that power be given to the Interstate Commerce Commission to revise any rates found to be unreasonable or discriminating; the revised rates not to go into effect until the action of the Commission shall have been, upon review, confirmed by the circuit court of the United States of competent jurisdiction.

*Resolved*, That the National Board of Trade earnestly advocates legislation by Congress to amend the interstate-commerce law so as to permit reasonable traffic agreements by railroads, under the supervision and control of the Interstate Commerce

Commission, to the end that unjust discrimination may be prevented and reasonable, uniform, and stable rates be established.

*Resolved*, That the act to regulate interstate commerce be amended, to wit, that private car lines and terminal or originating railroads engaged in interstate commerce be considered as common carriers and subject to the interstate-commerce act.

(The above was submitted by the chairman for the record January 19, 1905.)

FRIDAY, *January 20, 1905.*

The committee met at 10.30 o'clock a. m., Hon. William P. Hepburn in the chair.

**STATEMENT OF WALKER B. HINES, ESQ.—Continued.**

The CHAIRMAN. Mr. Hines, will you proceed? It has been suggested by Mr. Hines and by one or two other gentlemen that they would be glad if interruptions would not be made during their statements, but that the members should make notes of whatever they desire to inquire about and at the conclusion of a statement to make those inquiries. Of course I do not want to dictate to any member of the committee, but it is thought expedition might be secured if we adopt that plan.

MR. HINES. Mr. Chairman and gentlemen of the committee, I propose to devote the brief time allotted to me this morning to a discussion of the judicial review that is practicable and proper in the event any rate-making power is conferred upon any tribunal. The exercise of a rate-making power by any tribunal will involve two steps. The first is essentially judicial and is the decision whether or not the rate or rate adjustment complained of is unjust or unjustly discriminatory. A decision as to whether an existing condition is reasonable or unreasonable is in its nature judicial and has been so recognized by all the courts.

The second step in this exercise of the rate-making power is, when the existing rate or adjustment has been found unreasonable, the fixing of a rate for the future. The Federal courts have gone no further in clearing up the law on that point than to hold that that is a legislative and not a judicial act. The Federal courts have not thrown any light on how far the courts can consider on review the reasonableness of a legislative act. Of course difficulties in the way of an adequate review of that question are obvious, and, I think, have been frequently suggested to the committee.

Now, what the Federal courts will hold as to the extent of that review is of course a matter of speculation, and I do not find in the Federal decisions anything that affords a satisfactory basis for a reasonable prophecy on that point. I wish to suggest this idea, however, for the consideration of the committee. There are undoubtedly instances in which courts do pass on the reasonableness of legislative acts. A familiar illustration of that is when a court considers the reasonableness of an ordinance of a city council. The doctrine on that point seems to be that where the legislature has expressly authorized the municipality to do by ordinance a specific thing, and the city council



does ordain that specific thing, the courts can not review the reasonableness of that thing, because it is the legislature itself that has determined that that thing is reasonable in authorizing the municipality to do it.

But when the legislature delegates in general terms a power to a municipality not to do a specific thing but to do generally things in the discretion of the council, then the courts do consider the reasonableness of the ordinances that are passed. I had a copy made of section 328 of Dillon's Municipal Corporation, fourth edition, and the latter part of that section reads as follows:

What the legislature distinctly says may be done can not be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid.

That is on the city council. I simply suggest that as an analogy that may be of some assistance to the committee, and it does show that in some instances courts do undertake to consider the reasonableness of legislative action by a subordinate tribunal, although they do not undertake to consider the reasonableness of legislative action by the supreme legislative body itself.

Now, it is mere speculation to say to what extent, if at all, the courts of the United States would apply that rule to the judicial review of the reasonableness of an act of a commission in fixing a rate for the future. But I suggest that analogy for what it is worth in view of the fact that there is so much uncertainty as to what the court could or would do in that direction. I suggest that in the event any rate-making power is conferred, certainly the courts ought to be given expressly the power to review that part of the proceeding which is essentially judicial and concerning which the courts can undoubtedly exercise a power of review, and that is to review the decisions of the rate-making tribunal upon the preliminary question whether the rate or adjustment complained of is reasonable or unreasonable.

That is a jurisdictional question and can properly be submitted to the court for consideration, and undoubtedly ought to be so submitted in view of the grave doubt as to the extent to which the courts would feel authorized to exercise a power of judicial review as to the reasonableness of a rate fixed for the future.

There is a practical question involved here. All the gentlemen of the committee doubtless fully appreciate that the courts are extremely reluctant to interfere with the findings of tribunals on questions of fact. Whether an existing rate is unreasonable or whether a rate is reasonable for the future is unquestionably a question of fact. Courts do not overturn the findings of juries on questions of fact except in cases of gross palpable mistake on the part of the jury.

Courts of equity, when matters have been referred to a referee for investigation and report on the facts, do not overturn those findings without the clearest evidence of mistake. If the Congress shall declare that any tribunal is a proper tribunal to decide whether an existing railroad rate is unreasonable and what shall be the reasonable rate for the future, thereby showing the confidence of Congress in the ability of that tribunal to pass correctly on that delegated question of fact, clearly the courts by analogy to those principles that I have referred

to as obtaining in regard to common law in equity courts, and in deference to the views of Congress, will not attempt to interfere with the decisions of that tribunal unless such decisions are clearly, and I might say palpably, incorrect.

Some of the questions involved are of the most complicated character, and the courts always are reluctant to take upon themselves the heavy burden of going through a vast mass of detail for the purpose of finding that a tribunal specially selected for deciding the facts has decided those facts improperly. So that there is a practical difficulty in the way of any judicial review that may be adopted, and the probability is that every doubt will be resolved in favor of the finding of the tribunal primarily authorized and required to make a finding. The necessity for a judicial review of any rate made by any rate-making tribunal has, I think, been recognized throughout all the discussion that has taken place on the question.

Nobody has suggested that any commission ought to make rates which could not be judicially reviewed. That being true, it would seem necessarily to follow that in view of the doubts concerning any judicial review that can be provided Congress ought to make it just as full as possible, and when it has done that, even then every doubt is going to be resolved in favor of the rate-making tribunal. To make it as full as possible it seems to me it is absolutely necessary to provide that the court shall review the jurisdictional question whether the rate complained of is reasonable or unreasonable, for that is the only essentially judicial question in the proceeding. It is absolutely certain that the court can review, although even then it will resolve every doubt in favor of the finding of the lower tribunal.

The remaining question to be considered is as to whether it shall be considered before or after the execution of the finding of the tribunal. It would seem at first blush that to state that question was to answer it; that in a country where due process of law is the corner stone of the government, it would not be necessary to ask the question whether the decision shall be put into effect before or after a judicial consideration of it. But it has been urgently insisted that the decision of this rate-making tribunal should go into effect at once and let the judicial review take place afterwards. In its essence that is obnoxious to the principles of the government that seeks to accomplish due process of law. It is particularly obnoxious in this case because, as I pointed out yesterday, the present Commission, or any tribunal that is likely to be given the rate-making power, is so constituted and has such duties imposed on it that it is essentially a nonjudicial tribunal and exercises functions which make it almost impossible to assume a judicial attitude. Without enumerating those functions in detail, it is sufficient to say again that the Commission acts as detective, prosecutor, plaintiff, attorney for the plaintiff, and is throughout regarded as the champion of the shippers.

Now, to say that a commission so constituted shall determine the preliminary question, which is essentially judicial, that a rate complained of is unreasonable, and upon that determination shall take the power to fix a rate for that service out of the hands of the railroad company and substitute therefor a rate made by the commission itself, and that that determination shall be put into execution before there is any opportunity for any real court to give a judicial considera-

tion to those questions, it seems to me is utterly inconsistent with everything that is fair and just in a free government.

Moreover, it is not merely the direct loss which the railroad company would suffer pending a judicial consideration of the question. Other rates would be involved which are not directly affected by the order, and there would be direct losses to them. And in addition to that, pending this judicial review, commercial conditions would adjust themselves to the new rate put into effect, and after that judicial review had taken place it might be impossible, even though the courts decided that the Commission was wrong throughout, for the railroads as a practical matter to restore the status that existed before the Commission decided that that old rate was unreasonable, and thereupon took the rate-making power out of the hands of the railroad company. And this is a matter which is not only of vital importance to the railroads, but it is of vital importance to communities.

If the relative commercial importance of communities is to be fixed by the orders of this Commission, they are vitally interested in having the matter judicially determined before a decree is put into effect which may for all time affect their relative commercial status, no matter what the court may afterwards decide upon it. The time for the judicial review is when that judicial review will be undoubtedly effective, and the time for due process of law is before and not after execution. The latest expression on the part of any commercial body that has come to my attention on this question is the expression of the National Board of Trade which was given in this city a day or two ago after a full discussion of both sides, and that board then adopted a resolution that the rates made by the Commission ought not to go into effect until after a judicial review.

Those are the only two points that I will undertake to cover, in view of the brief time that I have. I feel that I have already trespassed too long on the time of the committee and trespassed too much on the time of other gentlemen who desire to be heard.

Mr. TOWNSEND. I would like to ask you one question. I do not know what you said before I came in, but you claim that if a review is to be had by the court of the rate it should also have power to determine the reasonableness of a rate as found by the Commission. Have you thought anything about the question as to whether the court, if one is established, should have the power to determine a rate other than that fixed by the Commission or that stated in the tariff schedule of the road?

Mr. HINES. I believe that question is probably disposed of by the decision of the Supreme Court in the maximum rate case, where they held that fixing a rate for the future was a legislative function. Now, any modified rate which the court would fix for the future would be fixed by the exercise of a judicial function, and I am afraid that the court would hold that a court could not exercise that power.

Mr. MANN. On the question of the review of the action of the Commission by the court, suppose we enact a law providing a method of review as set out in the law, is it your judgment that the companies affected would be obliged to follow that method or would they have the right to file the ordinary bill in equity asking for an injunction on the ground that the rates complained of were in violation of the Constitution of the United States?

Mr. HINES. I have not given that question mature consideration, because it has not before been presented to me. My offhand suggestion is that the courts would be inclined to say that the provision for review in the law was conclusive.

Mr. RICHARDSON. Has not the Supreme Court of the United States, in reference to where such commissions placed a rate too high or so high that there was not a fair profit on the property of the railroad or its investments, and so forth—the equipment, and so forth—invariably held where such a rate as that was fixed that it was confiscatory and that they would set it aside?

Mr. HINES. The only cases that have arisen that the Supreme Court has passed upon are cases where the rates fixed by the State commission did not yield enough to pay operating expenses.

Mr. RICHARDSON. Well?

Mr. HINES. Now, how far the court would go in determining what margin of profit would be allowed is of course speculative. They say that a fair margin of profit ought to be allowed.

Mr. RICHARDSON. Did not the court in doing that exercise its judgment as to whether the rate was reasonable or unreasonable?

Mr. HINES. It did to that extent.

Mr. RICHARDSON. Yes.

Mr. HINES. As to whether it was so unreasonable as to confiscate the company's profit.

Mr. WANGER. I understood you to say yesterday, that where the Commission found a certain rate to be unjust and unreasonable, and enjoined the railway company to desist from charging that particular rate, and also suggested what the just and reasonable rate ought to be, that if the carrier reduced the rate from what it was charging, but did not get down to the rate suggested by the Commission, the Commission might go into the circuit court and ask for an injunction to restrain the company from collecting the new rate which it had fixed. Did I understand you correctly?

Mr. HINES. Yes, sir; that was my statement of the law.

Mr. WANGER. Under what section of the act is that power conferred?

Mr. HINES. Under the Elkins law the Commission has the power to request the district attorney to bring a suit in the circuit court in the first instance to enjoin any form of discrimination, not merely a discrimination by giving a secret rebate, but a discrimination between tariff rates. That was decided by the Supreme Court in March or April, 1903, in the case of the Missouri Pacific Railroad Company against the Commission.

Now, any injustice in rates can undoubtedly be established on a relative basis. That is, if the adjustment is unjust, it can be established as an unjust discrimination between that commodity and some other commodity or between that locality and some other locality. Therefore, in my opinion, in any such case the Commission can exercise the power which is given by the Elkins law to go direct into court and seek to enjoin the continuance of that discrimination.

In addition to that, in any case where the Commission has had a hearing and has decided that an existing rate is unreasonable, and has ordered its discontinuance, and the carrier has reduced the rate, but not to the point which the Commission has fixed, then as the Commission has already all the facts, it could have a summary hearing, and in

ten, twenty, or thirty days it could make a new order and institute proceedings on that, and follow precisely the procedure outlined in the old bill with practically no delay, and secure the discontinuance of the new rate.

Mr. STEVENS. I do not know whether the question was asked before I came in on the question of the power of the court to fix a rate for the future. Supposing that a bill something like one of these pending before the committee was passed and a rate of 12 cents a hundred was in existence between two points and complaint was made of that rate by the shipper and reparation was demanded for unjust charges and a hearing was had and a rate of 8 cents was fixed by the Commission and an order for reparation made. Then suppose the railroad, feeling itself aggrieved, took proceedings for review before the court, and the court adjudged that 8 cents was too low and that 10 cents a hundred was a just and reasonable rate, and made an order for its establishment, would the court, in that same proceeding, if the petition of complaint was broad enough, also give an injunction against the continuance of any rate over and above 10 cents?

Mr. HINES. I am afraid that the decision of the Supreme Court in the Maximum Rate case would be in the way and it would result that fixing the rate at 10 cents for the future would be decided to be a legislative function which the court would not exercise.

Mr. STEVENS. The court of review held that 10 cents was a just and reasonable rate, as shown by that litigation in that case.

Now, would not the court, if the papers and proof authorized it, issue a mandatory process against charging more than a reasonable rate?

Mr. HINES. It might issue a general injunction against anyone charging more than a reasonable rate.

Mr. STEVENS. If it found 10 cents was a reasonable rate and ordered reparation on that basis, would not that fix 10 cents as the reasonable rate?

Mr. HINES. I am afraid it would not. I am afraid that point was pretty prominently involved in the Maximum Rate case, and that could not be done by a court.

Mr. MANN. That is, that the court would not say that a rate to-day of 10 cents would necessarily be a reasonable rate to-morrow?

Mr. HINES. I think that is practically decided in the maximum-rate case.

Mr. STEVENS. It would hold that 10 cents was a reasonable rate between those parties in those circumstances?

Mr. MANN. That is, after to-day?

Mr. STEVENS. Yes, sir; that is shown in the occasion for which this legislation arises, of course. But this is a continuing rate and it includes a continuing wrong, and can not the court guard against a continuance of that wrong, and prevent a multiplicity of actions by an injunction against that wrong?

Mr. HINES. If it does that, it seems to me that it is making a rate for the future.

Mr. STEVENS. It does not make a rate for the future; it enjoins against a wrong that has existed.

Mr. HINES. If it enjoins against the charging of more than 10 cents, it seems to me that is fixing 10 cents as the maximum rate for the future.

Mr. MANN. Do you think there is any doubt about our power—the

legislative power—to say that when the court ascertains that 10 cents is a reasonable rate to-day, that rate shall be a reasonable rate for a certain time in the future, and to direct the court to fix it?

Mr. HINES. That is a new aspect of the matter that has not been presented to the Supreme Court. It seems to me that there is a reasonable basis for a distinction there; that it is in the power of the legislature to declare that a rate that is reasonable to-day shall not be exceeded for a specific length of time, and that the legislative act there would be by virtue of an act of Congress and not necessarily by virtue of a decision of the court. I think there is room for a distinction there. I have not had opportunity to think that over, but I do not think that question is foreclosed by the maximum-rate case.

Mr. TOWNSEND. You and Mr. Spencer both have claimed, as I understand you, that if the railroads sustain a loss during the lean years, or during depressed years, they would have a right to recoup damages for that loss, or to recover that loss by extra charges thereafter or during prosperous years. Am I correct about that?

Mr. HINES. I do not claim that the railroad company has an absolute right of that sort, and it certainly has no right to prepare for lean years by charging unreasonably high rates in prosperous years. But I say that the fact that a railroad company makes a reasonably large or considerable return on its investment in prosperous years is no reason why its return for those years should be reduced, provided its rates are reasonable and not extortionate, and there is a very strong, practical reason for that, which arises out of common justice, that a railroad company which has to take all the risks for lean years should be allowed to make as large profits in the prosperous years as can be done by charging just rates.

Mr. TOWNSEND. On what are you going to figure the profits—on the actual capitalization of the road?

Mr. HINES. The Supreme Court of the United States has held that the actual present fair value of a property is the basis for a consideration of these questions.

Mr. TOWNSEND. In the case of the Southern Railway Company, that was mentioned by Mr. Spencer, that system is composed of a number of roads that were bankrupt, which were absorbed by this system when they were in a bankrupt condition, resulting from the depressed conditions of trade during the lean years, as we call them. Now, do you maintain that the people should allow the Southern Railroad system to recover its losses based on the original capitalization of those bankrupt companies?

Mr. HINES. I do not know anything about the facts of that particular case, but I do not maintain that rates must be high enough to pay a profit necessarily on the original capitalization. The Supreme Court has held that that is a question that is entitled to fair consideration under the facts of each case.

Mr. TOWNSEND. This loss that was sustained by the railroads during these years was not the only loss that was sustained. The people generally who patronized the railroads sustained losses during those same years?

Mr. HINES. Yes, sir; but the people get the chance to make that up in the prosperous years, and my contention is that the railroads ought to have, within fair limitations, the same chance.

Mr. TOWNSEND. They would not have a chance to make that up from the railroads if the railroads were to increase their rates for transportation?

Mr. HINES. I do not think that follows. If you will allow me to give an illustration I would like to do so. Take the production of iron. The rate on iron moves up or down with some relation to the price of iron. During the depression in the iron business, about 1895, 1896, and 1897, the rate on pig iron from Birmingham, Ala., to Louisville, Ky., which is the base rate, was reduced to \$2 a ton, which was the lowest rate in its history. The iron business began to improve by leaps and bounds, I think, about 1899. That rate was then raised to \$2.50, which was the standard rate. Then iron went up to a phenomenal price, and the ironmasters were making tremendous profits. Every steel rail that the railroad companies were buying was costing a great deal more than it was in the previous years, and all sorts of materials into which iron entered were costing the railroads more.

They then raised the rate from Birmingham, Ala., to Louisville, Ky., to \$3. That did not prevent the ironmasters from making an enormous profit. That gave the railroads a slight share in the great prosperity. As soon as the iron business began to get slack again and iron went down, that rate went down to \$2.50 a ton, which is the standard basis, and if any severe depression should come it would probably fall to \$2; and if the railroads increase rates to a reasonable degree in times of unusual prosperity, such an increase does not absorb any great part of the profit the people make in those times. It is simply sharing, in a very modest manner, in the profits the people make in those prosperous times.

Mr. RICHARDSON. It seems to me, and it struck me more forcibly than any other part of your statement, from the answer you made to Mr. Mann's question asked a few moments ago, and I want to understand you fully on that subject if I can. Your answer to that question involved this idea, that the Maximum Rate case tended to show that the Supreme Court would not fix a rate for the future, but that the hypothesis which Mr. Mann made presented a new view, and a doubtful one, and he thought possibly it might get rid of that view of the Supreme Court for fixing a rate for the future. Give me, if you please, as far as you can—and I know you can do it fully, on this matter of the hypothesis presented by Mr. Mann, and the view of the Supreme Court heretofore as to fixing a maximum rate—or rather a rate for the future.

Mr. HINES. I have not had occasion to consider that point until the suggestion was made this morning, but the distinction, it strikes me, is this. If an act is passed which says in general terms that the court shall fix what it terms a reasonable rate for transportation by rail, then the Maximum Rate case comes in and says that fixing that rate for the future is a legislative function which it can not exercise.

Mr. RICHARDSON. If Congress should pass an act saying that whatever rate the revising court fixed should be the rate and stand as the rate, that, you think, would get rid of the difficulty of the court acting in a legislative capacity?

Mr. Hines. Yes, sir; I think that. The Maximum Rate case establishes the fact that the determination of what is a reasonable rate to-day is a judicial question.

Mr. RICHARDSON. Would not that encounter this objection, that whatever could not be done directly could not be done indirectly?

Mr. HINES. That is an entirely different question, I think, Judge Richardson. The difference impresses me in this way. It seems to me that it is entirely competent for Congress to declare, subject, of course, to the limitation that it should not result in confiscation of property, but only subject to that limitation, that the existing rates in this country to-day shall not be exceeded for twelve months. That would be a legislative act. Now, it seems to me, if Congress can do that, it can say that the existing reasonable rates in force to-day shall not be exceeded for twelve months, and leave it to the courts to determine the essentially judicial question, what is the existing reasonable rate to-day.

Mr. ADAMSON. Then if Congress enacts that a rate adjudged by a court to be a reasonable rate shall remain the rate, it will not be obnoxious to the theory that it is vesting the one tribunal with the double authority, legislative and judicial?

Mr. HINES. Offhand, that is my opinion. As I say, I never had occasion to consider that question until this morning, but it seems to me that makes a distinction.

The following was submitted for the record by Mr. Adamson January 19, 1905:

NEW YORK, N. Y., January 16, 1905.

HON. W. C. ADAMSON,  
*Member of Congress, Washington, D. C.*

MY DEAR SIR: Referring to my conversation with you on Saturday last, at which time you furnished me copy of the "Hearing before the Committee on Interstate and Foreign Commerce of the House of Representatives on January 9 and 10, 1905," I note with particular interest the testimony in regard to the peach shipments from Georgia.

A large majority of the peaches forwarded from the Southern States originate on the lines of the Central of Georgia Railway, and during my connection with that company, as vice president and president from the latter part of 1896 to the last month of 1903, nothing was left undone by myself or other officials of the company to foster and encourage the peach industry in Georgia and Alabama.

The peaches shipped from that section and the orchards containing millions of trees that were planted along the lines of that railway will bear testimony as to what was accomplished during that period.

The difficulties encountered in shipping the crop of 1896 was detailed to me by the operating officials, and it was decided after an exhaustive study of the situation, at which time the views and suggestions of the principal growers were obtained, that it was to their interest as well as from the railway standpoint that an agreement should be made with a company who would guarantee the furnishing of the proper cars, including labor and ice, and see that each and every car was properly attended to, not only at the originating point, but at certain intermediate stations up to its point of destination.

The Armour Car Lines were selected, and at all times performed their part of the agreement with satisfaction.

During certain years, owing to shipments exceeding the estimates, they were obliged to transport ice from points in Illinois and Indiana; again, ice was brought from the coast of Maine by vessels to Savannah and thence by rail to the peach-shipping stations. One year, after careful preparations were made to handle the crop, owing to climatic conditions there was not a car of peaches forwarded.

From my knowledge of the situation I can positively state, first, a bulletin was posted each morning by the railroad company, stating the number of cars forwarded the day before, and their destination, so that each shipper would know the exact situation.

Second. The Armour Car Line people, or Armour & Co., did not purchase any of the peaches, and were in no manner interested in the purchase and sale of same.

Third. They had no voice in the distribution or allotment of the cars that was within the province of the railway company through its authorized agents.



Fourth. The tariff schedules for refrigeration, which included all cost for that service, covering the icing of the car for the purpose of cooling same before placing the fruit in it and all icing and care of cars at all intermediate stations to its terminal point, was placed on the waybill by the originating line, and settlement made with them to the Armour Car Line, not by the terminal line, as indicated in the testimony.

Having familiarized myself with the cost of refrigeration by the Armour Car Line, I have no hesitation in saying that in my opinion the same is fair and reasonable, as well as the charges made by the railway for transportation. The canteloupe and plum shipments are included with the peaches.

The movement of the peach crop is a transportation problem peculiar to itself. It occupies the space of time from a month to six weeks' duration. In my judgment, the enactment of any legislation effecting the present arrangements that the railways are able to make with the car line would result in the latter withdrawing from that service. They can not afford to decrease the cost of refrigeration and give satisfactory service.

The railways are unable to own and furnish the special equipment to handle the crop within the limited time. Consequently to curtail the existing satisfactory arrangements or detract from it in any manner would prove an injustice and financial loss to the southern producer of fruits and stop the rapid progress now being made.

The interest I feel in the success of that industry owing to my past connection with it, and the kind treatment accorded me at all times by the producers, is my excuse for inditing this appeal to you.

Thanking you for the opportunity, I remain, dear sir, yours, very truly,  
JOHN M. EGAN.

#### STATEMENT OF H. L. BOND, JR., ESQ.

Mr. Chairman and gentlemen, as I labor under the disability of being a railroad attorney, perhaps I ought to say that I do not represent more than one railroad, and possibly in some matters do not reflect the opinion of other railroad counsel. Possibly the committee will hear me on the theory that I have never been in the legislature or held any public office, and therefore, under Judge Crump's definition, am one of those entitled to speak on these matters—at least in Virginia. [Laughter.]

Now, I want to avoid, as far as I can, a repetition of what has been so well stated by Mr. Hines. I want to say that in my opinion, and I think in the opinion of every other railroad lawyer, he has not in any respect exaggerated the importance of the matters here, or the difficulties of the proposed centralization of rate making. I think I can perhaps add to what he has said only by calling the attention of the committee to specific instances.

Mr. TOWNSEND. What company do you represent?

Mr. BOND. I am second vice-president of the Baltimore and Ohio Railroad Company. I hold in my hand the official record of the Maximum Rate case—by the way, the only copy the Commission had. The order of the Commission in that case was made on the complaint of the Chicago Freight Bureau against 35 railroads. The order is as follows:

It is ordered and adjudged that the above-named defendants, and each of them, engaged or participating in the transportation of freight articles enumerated in the Southern Railway and Steamship Association classification as articles of the first, second, third, fourth, fifth, or sixth class, do, from and after the 10th day of July, 1894, wholly cease and desist, and thenceforth abstain from charging, demanding, collecting, or receiving any greater aggregate rate or compensation per hundred pounds for the transportation of freight in any such class from Cincinnati, in the State of Ohio, or from Chicago, in the State of Illinois, to Knoxville, Tenn., Chattanooga, Tenn., Rome, Ga., Atlanta, Ga., Meridian, Miss., Birmingham, Ala., Annis-

ton, Ala., or Selma, Ala., than is below specified in cents per hundred pounds under said numbered classes, respectively, and set opposite to said points of destination, that is to say—

And here follows the complete tariff for the six classes, and then the order continues:

And said defendants and each of them are also hereby notified to further readjust their tariffs of rates and charges so that, from and after said 10th day of July, 1894, rates for the transportation of freight articles from Cincinnati and Chicago to southern points, other than those hereinabove specified, shall be in due and proper relation to rates put into effect by said defendants in compliance with the provisions of this order.

*And it is further ordered,* That a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the Commission herein, in conformity with the provisions of the fifteenth section of the act to regulate commerce.

Mr. Spencer has told you that that affected two thousand rates. I have the estimate of the traffic officers of some of the southern roads—informal, of course—that that order would have meant a loss of revenue of at least \$3,000,000 per annum; or, let us say, it would have destroyed the borrowing power of those railroads to the extent of \$50,000,000.

Now, we must admit, I think, that a \$50,000,000 case is an important matter. It may have been only a coincidence, but this order was passed, as you will remember, in 1894, when these railroads were flat on their backs and a large part of the mileage of the present Southern Railway was in the hands of receivers. The decision of the Supreme Court in the Maximum Rate case, which has been so bitterly complained of as depriving the Commission of this power, was made in 1897; and it was only following that decision that the revival in the railroad prosperity and credit of this country took place. That may be only a coincidence, but in the minds of a great many railroad people, investors and managers, it is more than a coincidence. They think that that decision of the Supreme Court removed a cloud from the credit of the railroads of this country, and that the legislation proposed here is legislation that will recreate that cloud on the railroad credit. Now, that is a view. But, whether we may agree with that or not, I think the committee must agree that these matters are of great importance.

Let us look at it, then, from the point of view of the public, and not simply of the railroads. In the first place, what is the situation of the railroads of this country to-day? It is only two years ago that every one of the trunk lines was refusing to take cars, refusing to accept freight from its western connections. Why was that? Obviously because the railroads of this country had not kept up with the growth of the country; and the reason they had not kept up with the growth of the country was because of the depression that existed from 1893 on to 1899 or 1900. Now, unless these railroads have credit it is impossible for them to keep up with the growth of this country, for the only way they can get the money to keep up with that growth is to get it either on stocks or bonds; and if you deprive the railroads of this country of their credit the growth of the country will stop. It is a physical impossibility for the country to grow without improved transportation facilities. It is not a question of rates, it is a question of facilities. There is not a merchant in the country who will not tell you that two years ago he did not care what rate he was charged if he could only get a car.

Now, in another aspect let us look at the public importance of these matters. In 1890 the New York Board of Trade and Transportation filed a complaint with the Interstate Commerce Commission that the railroads running from the ports of the Atlantic seaboard and of the Gulf were charging less on imported merchandise from Europe carried on through bills of lading than they charged on merchandise originating at the seaboard, and that that was an unjust discrimination under the interstate-commerce law. Among the defendants were practically all of the great trunk lines and a great many of the other roads; among the others were the roads from the port of New Orleans, at least the Texas and Pacific. The Commission decided January 29, 1891, that that method of making rates was illegal—was discriminatory—and they proceeded, by a bill in equity in the circuit court in New York, to enjoin all the defendants. They did not catch some of the defendants in New York, but they caught the Texas and Pacific Railway, and they obtained an injunction against the Texas and Pacific to restrain that company from charging less on import traffic than it charged on traffic originating in the port of New Orleans—in the city of New Orleans.

That case was affirmed by the circuit court of appeals, sitting in New York, June 3, 1893, and it went to the Supreme Court of the United States and is reported in 162 U. S., 197. The Supreme Court (March 30, 1896) held that the present act to regulate commerce was an act for the promotion of commerce and not for its restriction and destruction; that under the terms of that act, under the third and fourth sections of the act, the commercial conditions affecting this import traffic could be considered and must be considered, and that the failure of the court of appeals and the circuit court and the Interstate Commerce Commission so to consider it required a reversal. Now, what did that do for the port of New Orleans? It kept open that port. It was that decision that made the growth of that port possible. The Commission had it closed. If the provisions of the Quarles-Cooper bill had then been law the port would have been closed to imports from 1891 to March 30, 1896. Of course, the trunk lines were not sorry to have it closed, but I am just giving that as an illustration of the importance of these decisions, the far-reaching effect on railroads, and not merely on railroads but on the communities.

It is not so much the possibility of any bias against railroads on the part of the Interstate Commerce Commission or any other commission that creates apprehension with those who think—who have to think—about these matters. You take any set of men and you give them an occupation that takes all their thought and mind, and the stronger-minded those men are the more apt they are to evolve some theory; the more apt to want to shape the world to suit what they believe—and sincerely believe—to be the right course. Why, even as I may say in confidence to the lawyers present, we sometimes believe when a member of the bar is elevated to a court beyond which there is no appeal, that his views on political economy and government generally have some effect on his views of the law. Much more is that the case and it is bound to be the case with any commission that is appointed to deal with such a matter as the transportation of this country. And we are not speaking now from any theory; we have only to look at the history of the subject.

Take the very first case that went to the Supreme Court from the decision of the Commission, which was the Party Rate case. The Commission in that case decided that it was a violation of the law for the Baltimore and Ohio Railroad Company to sell tickets to parties of ten or more at 2 cents a mile, because it was a discrimination against the first-class passenger. Of course the Supreme Court, when the case got there, decided that there was no justification in the law for any such opinion. The Commission's decision, as you will perceive, was not in any way, shape, or form directed against the carrier. It was a decision that absolutely would have driven out of business every small traveling theatrical company in this country, and would have stopped your baseball nines.

Mr. MANN. That would be an attack upon all our institutions.

Mr. BOND. Yes; our national game. But that fact did not appeal to the Commission, although it was urged on them with tears. They had conceived a theory as to how passenger rates must be adjusted in the country, and had decided that they must be spread evenly over all the passengers, and that if I, as a member of a baseball club, traveled in the same car with you, who were a first-class passenger, I was somehow injuring you if I did not pay 3 cents a mile and you had to pay 3 cents a mile. Now, that was a pure theory, and that is not the only instance. This instance of the decision as to the import rates was just simply another theory. They thought—they found—that unless they restricted the carriers to the same rate on imports that they charged on local business from the seaports that there was nothing, as they said, in the act to cover the business, and they could not control it, the whole theory being that they had to spread this act so as to control everything. That was purely a theory.

The same way in all these cases on the long and short haul. Long after the courts had decided that the commercial conditions affecting the traffic, the competition of markets, the competition of other carriers—although they were rail carriers—long after the courts had decided that those matters were circumstances and conditions to be considered under the fourth section of the act, the Commission went on and tried to distinguish the cases and say that this case or that case was not covered by the decisions of the court. They just hung on to that theory to the bitter end; and it was only in 1902 that Chairman Knapp told you here that these decisions had practically destroyed the fourth section of the act. Now, that was a theory—in perfect good faith, of course, but still a theory—that would have destroyed the whole fabric of the business of the South. The whole South is built up on the other theory, and no business man in the South would have known whether he was located in the right place or the wrong place. Now, theorizing is a quality of the human mind; it is not confined to any body of men, it is universal; and it is one of the serious things to guard against in this matter.

Mr. TOWNSEND. Is not that also possessed by the railroad men who fix tariffs?

Mr. BOND. There seems to be an entire misconception of how rates and tariffs are fixed by railroad men. Of course the tariffs are a historical fabric; but the tariffs of this country to-day, all the tariffs that are made to-day are made by the shippers and the railroads together. They are made by two sets of people who have one common interest

and that common interest is that the traffic shall move. Unless the traffic moves, there is nothing in it for the railroads. Unless the traffic moves there is nothing in it for the shippers; and they have got to come together on a proposition that will enable the traffic to move; and that is the distinction, and the vital distinction, between the making of rates as they have been made in this country, by the shippers and the railroads in conference, and the making of rates by a governmental board that sits up and evolves a theory of how the laws of trade should operate, what community should have an advantage, and how much of an advantage, and then tries to demonstrate that theory despite the laws of trade.

Now, that is the vital and essential difference. And when you hear people talking of railroads sitting up and making rates, they are talking about something they know nothing about. The railroads do not sit up and make rates; they can not sit up and make rates; they are absolutely in the power of these commercial laws. They have got to make rates that will get the commodities to market, that will enable the commodities to move in competition with the same commodities moving from some other source of supply, and what they have to do is to agree with the shipper as to what rates will move the traffic.

And I want to say that it is not because we have not had able men on the Commission, because we have had great ability on the Commission; that their record in the courts is twenty-two misses to one bull's-eye and two in the next ring. That is their record. [Laughter.] That is not because they are not able men. It is because they are able men, because they have been strong-minded men. But being strong-minded men they would evolve a theory by which the business of this country was to be governed, and, unfortunately for them, the Supreme Court said that there was no such theory in the law, and that the theories they evolved were contrary to the spirit of our institutions.

I think that the committee must have appreciated from the statement of Mr. Hines the further difficulty of the physical disability—impossibility—of bringing to one central office in the city of Washington the questions which are under daily and hourly discussion by thousands of railroad traffic men and shippers by railroad throughout this country. What he said there as to the changing of a rate, one rate bringing all the others in, is illustrated by the order in the Maximum Rate case, which I have read to you, and is absolutely true, as he so graphically stated it. The rates in this country are not a set of independent lines; they are a fabric. They are so interwoven everywhere that if you shorten one thread you will make a kink in that fabric that may run almost anywhere. And there is not anybody in the railroad world who can tell where it is going to run.

I want to call the attention of the committee to the fact that since the passage of the act to regulate commerce the lines that use the official classification have found it necessary to promulgate 26 of these documents [indicating book].

Mr. MANN. Might I ask you if you could furnish to the committee some copies of the official classification, of the last edition, and also some copies of your schedule of rates?

Mr. BOND. I shall be very happy to do so. The schedule of rates, if you cover all the commodity rates, would probably be something of a volume, but I shall be glad to furnish it if you want it. As a mat-

ter of history, perhaps of curious history, I have attached to this official classification extracts from the acts relating to the Baltimore and Ohio Railroad Company, the first railroad of any size in this country, which show the rates and classifications in force on that road by virtue of the statutes down to 1840. The final wind up, I will say, was that with the exception of flour, marble, granite, soapstone, limestone, and lime, the rate per ton per mile on the Baltimore and Ohio Railroad for all articles was 8 cents per ton per mile, and prior to that time some other articles, including whisky, had been transported at the rate of 4 cents per ton per mile. The present official classification contains 9,800 articles.

The CHAIRMAN. That paper you have referred to there is so detached that it could go into the minutes of this meeting.

Mr. BOND. Yes, sir.

The CHAIRMAN. Let it go in the record, then.

Mr. BOND. Very well.

The extract referred to is here printed in the record as follows:

CLASSIFICATION AND RATES—BALTIMORE AND OHIO RAILROAD.

(1826, chapter 123, sec. 18, original charter.) On all goods, produce, merchandise or property of any description whatsoever, transported by them from west to east, not exceeding one cent a ton per mile for toll and three cents a ton per mile for transportation; on all goods, produce, merchandise, or property of any description whatsoever, transported by them from east to west, not exceeding three cents a ton per mile for tolls and three cents a ton per mile for transportation.

(1830, chapter 117.) The company may contract for transportation of mail: "and said company shall have power to make special contracts with any authorized officer or agent of the State of Maryland, or of any other of the United States, or with any corporation, copartnership or individual, for the exclusive use of any car, or part of a car, or wagon on said road, for a limited time or distance, and for the transportation thereon of horses and other living animals, and of carriages, furniture, plate, jewelry, and machinery of any description, on such terms as may be agreed on by the parties.

"That it shall be lawful for the president and directors of the Baltimore and Ohio Railroad Company aforesaid, or a majority of them, to regulate and fix, from time to time, the price or sum to be charged and taken by the said company for receiving, weighing, delivering, and storage of merchandise, produce and other articles; and for the transportation of any single bale, box, or parcel of merchandise or other articles not exceeding two hundred and fifty pounds."

(1836, chapter 261.) In lieu of the charges for toll and transportation authorized by act of 1826, chapter 123, section 18, "the said company shall have power to charge on all goods, produce, merchandise, or property of every description whatsoever transported by them upon their said railroad, not exceeding eight cents per ton of two thousand pounds per mile, provided that the maximum of charge per ton per mile upon the said road upon the articles of flour, grain, corn, oats, tobacco, whisky, coal, iron, lime, ore, lumber, plaster, stone and wood, fish, and salt shall not exceed the rates allowed by the said act of incorporation.

"That in all cases where the weight of any article shall not exceed five hundred pounds the said company shall have power to charge, at their discretion, either by bulk or by weight, on their said road and its branches, estimating fifty cubic feet as equivalent to a ton.

"By the act of 1840, chapter 86, grain, corn, oats, tobacco, whisky, ore, iron, and lumber are taken out of the exception made by the act of 1836; ten barrels of flour are to be taken for a ton, and the charges upon marble, granite, soapstone, limestone, and lime are to remain as authorized by act of 1826, chapter 123."

Mr. STEVENS. Have you any estimate of the proportion on that road of the traffic moving by commodity rates as compared with that moving by class rates?

Mr. BOND. I have not, although the Baltimore and Ohio Railroad is

a very large bituminous-coal road. Bituminous coal does move in carloads under a commodity rate practically.

Mr. STEVENS. So that what might be true of your road would not be true of all?

Mr. BOND. Might not be true at all of other roads.

Without repetition I can hardly dwell further on the general propositions involved, but I want to try to make some suggestions which possibly may be helpful. The line of distinction, of course, is the line that must be drawn between the theory of regulation under the present act, which is a theory of regulation by an administrative body all of whose acts shall be subjected to the decision of a court before they can be put into effect, and the proposed theory of regulation by which this administrative body shall be vested with a power—a legislative power—that makes it—to a certain extent, at any rate—independent of and superior to the court in the matter of rates.

As soon as you cross that Rubicon, no matter how you may hedge in that legislative power, you have made a vital step, a step not in the mere matter of procedure, but in the matter of principle of regulation. And it is that fact which has excited so much interest, and possibly, I may say, opposition to the proposed legislation. It is not because the carriers, or anyone, would deprive the Commission of any efficient procedure under the present theory of regulation, but it is because in the estimation of a great many people, and particularly of the lawyers, this change—this proposed legislation—is a radical step, a change of principle; and however it may be hedged in, it is regarded by them as threatening and dangerous. In my opinion no such change of principle is necessary to meet all the requirements of the situation and all the requirements of the public. But before I come to that, I should like to refer a little to the existing state of the interstate commerce law, because without some statement of that sort a good deal that I may want to say would not appear relevant.

The law was reinforced most strongly, and I might almost say revived, by the passage of the act of 1903, that is, the Elkins Act. The mistake that had been made in the effort to enforce the law as against rebates and discriminations was the mistake of endeavoring to enforce the second section of the act. There seemed to be no appreciation of the importance of the sixth section, which required all the rates to be published and the schedules to be filed. Now, it is one thing to find that a railroad company has charged two different men two different rates under substantially the same circumstances and conditions, even of transportation. That is one thing, and that is a very difficult thing, because they do not do it. It was perfectly easy to give one's own shippers the advantage over the shippers by another line without any discrimination among one's own, and unless the carrier could give its shippers that advantage without such discrimination it would make no cut in rates. That is the whole secret. But when the carrier must make all rates public and then keep to those public rates, you have a case that can be proved absolutely and easily, and, further than that, you accomplish the result of preventing discrimination through the mathematical proposition that things that are equal to the same thing are equal to each other.

Now, that is the key to the enforcement of the law to-day. Further than that, the Elkins Act gave a clear remedy by injunction, which was

the thing that was absolutely and cryingly needed for years. Whatever may be thought of government by injunction it is the only government to accomplish results, such as you wish to accomplish in this case.

The Commission, if it has any reason to believe that any common carrier is not charging the published schedule rates, can apply for an injunction and get an injunction of the most sweeping kind, and there is not a railroad carrier in this country or any other country that would dare to violate such an injunction. So that that provision now is the key of this whole act. Despite the advice of railroad counsel, the Commission were a long time finding it out; but they have it now, and there is nothing that you could do that could add to the efficiency of the present remedies against discriminations and rebates. But that enforcement is an enforcement which under the act can only be had by and through the Commission, and it is of vital interest to the carriers as well as to the public that the Commission should continue to have the time and to have the disposition to enforce the provisions of the sixth section through the Elkins Act.

That act has changed the situation in a way that seems hardly to have been considered in the draft of some of these measures. The act says:

Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of this act.

In other words, under this act it is an essential part now of your whole system of regulation that these published schedules are the evidence and the only evidence of what the rate is. You have got a complete, absolutely efficient system, as I say, if it is enforced, to make your rates uniform as between shippers—that is to say, to secure the observance of the published rates.

Now, of course the question is, suppose those published rates are not right? Suppose they violate the third or the first or the fourth section, what is to be done? Well, as the act stands to-day, the Commission can institute an investigation on its own account, or anybody can file a complaint with the Commission, which it will investigate. And after it has investigated, it can enter its finding as to the validity, the lawfulness, of those tariff rates, so far, and it can get an injunction if they are thought to be unlawful, restraining the further continuance of those rates. That puts it up to the carrier, of course, to publish a new and a different rate, because he can not carry the traffic at all under the Elkins law unless he has a schedule in effect covering the rate, and if the charging of that particular rate has been enjoined he has to publish a new schedule.

The complaint, as I gather, is that under that system there is too much delay; that the carriers can litigate the question when the Commission goes into court to get the order; that the litigation as the law stands may be carried to higher courts, and so on. And that complaint is always presented as though it were the case of some single shipper about some single rate, and without any very grave consideration of the importance of these cases or of the enormous amounts involved in them to the carriers and to the communities.



Mr. Knapp, when he appeared here before this committee in 1902 on the Corliss-Nelson bill, stated the question to be this:

If, after complaint and notice and due hearing and opportunity for the carriers to show every fact upon the question presented, if those facts establish with reasonable certainty that charges complained of are wrong, the question is, shall the Commission have authority to say what the carriers are to do to correct the wrong? That is all there is of it.

And, according to the opinion of the New York Herald, that situation has not changed. I read from an editorial in that paper of this morning:

The proposition against which strongest objection is made is that described as delegating the tremendous power to fix the railway rates of the country, and it is urged that this would inevitably lead to operation of the roads by the Government. The phrase is grossly misleading. The manufacturing, commercial, and agricultural organizations, and individual shippers conducting the agitation do not ask that any Government authority shall take the "fixing" of rates out of the hands of the railway managers. It is urged merely that the authority now exercised by the Commission to hear and investigate complaints as to the injustice of a particular rate shall be extended, so that a rate which the Commission may prescribe as reasonable shall be substituted and become effective, but subject to revision by the courts. This is the power the Commission was supposed to possess during the fourteen years of its existence and until otherwise decreed by a judicial interpretation of the interstate-commerce act.

Now, if that is all, as Chairman Knapp says it is, and as I believe it is myself, to revolutionize your whole theory of regulation, to cross this Rubicon of vesting in a commission legislative power, in order to accomplish those results, is about equivalent to blowing up this Capitol building with dynamite in order to dislodge the English sparrows that build their nests in the eaves. There is no necessity for it, and the means are absolutely unjustified by the end. I confess that personally—and I do not, in this, voice the opinion of a great many railroad counsel—I have always had sympathy with the view of the Commission to the effect that they ought to have the chance to say what, in their opinion, the changes should be in order to bring rates in line with the law, and that there ought to be some way of giving that opinion of theirs some legal effect.

Mr. STEVENS. Would you make it advisory?

Mr. BOND. No, sir; I would not. I would adopt the suggestion that has been made here. I think that is a perfectly feasible suggestion.

Thereupon the committee took a recess until 2 o'clock p. m.

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SATURDAY, *January 21, 1905.*

The committee met at 10.30 o'clock a. m., Hon. William P. Hepburn in the chair.

#### STATEMENT OF MR. H. L. BOND, Jr.—Continued.

The CHAIRMAN. You are to proceed for twenty minutes, Mr. Bond. As our time is limited you will not feel aggrieved if I call time on you.

Mr. BOND. Very well, Mr. Chairman. Gentlemen, I am far from wishing to suggest legislation. I believe individually that the interstate-commerce act as it is, if it is worked out now with the aid of the

Elkins Act, and in the light of the decisions of the Supreme Court, which have settled the main principles of the law, is a perfectly feasible and competent law. But I realize that what you gentlemen may wish to know is how far it is possible to comply with the wishes expressed by the chairman of the Interstate Commerce Commission and by others, without taking the radical step of departing from the whole scheme of the present interstate-commerce act.

You may also wish to know what is the utmost that can be done to expedite the final decision of controversies as to rates that may arise between business interests and the railroads. With a view to answering those questions for myself alone, because I have had no opportunity to consult other railroad counsel on this matter, and as I felt if I appeared here you would have a right to any knowledge or suggestion that I could impart, I have sketched a plan, by which I believe you can accomplish everything that is asked and accomplish it much more efficiently than it would be accomplished by any pending bill. This plan is as follows:

1. Establish a special court of equity composed of circuit judges so assigned that they be not confined to the one class of work, but participate in work on circuit and in circuit courts of appeal.

2. Provide a larger Interstate Commerce Commission.

3. Provide that when the Commission in a regular proceeding on petition finds any rate unlawful the Commission shall find also what change is at that time necessary to make the rate lawful.

4. Provide that in such case the Commission forthwith file a petition in the court, accompanied by its findings, record of testimony, etc., and praying an adjudication of the matters embraced in the findings as against the defendants.

5. Provide that thereupon the court issue process with copy of the petition attached, notifying each defendant to appear on a day named for hearing of the matter not less than thirty days after service of process, and to file an answer ten days before such hearing. In default of answer and appearance let the court decree the matters as found by the Commission. If a defendant appear and answer, have a speedy hearing, without formal pleadings, etc., on the record filed by the Commission (unless the court provide for additional evidence), and have the court decree what, on the law and the facts, is lawful and equitable as the present rate.

6. Provide that the court's decree be conclusively binding on the defendants for one year thereafter; and the carriers defendant be bound to publish and file schedules in conformity therewith, compliance to be summarily enforced.

Mr. TOWNSEND. Is not that making a rate for the future?

Mr. BOND. No, sir; it is deciding, as I see it, what every court would be called upon to decide to-day in a suit of a shipper under the eighth section of the present act, who alleged in his suit that the rate charged him was unreasonable and asked damages. The court would be called on to decide as of that time whether the rate was unreasonable, and if so, how far unreasonable, because the measure of damages would be how far it was unreasonable. In this case that decision is given effect for the future, not by virtue of the decree of the court, but by virtue of the act of Congress, which says that after a rate has been so adjudicated there shall be a conclusive presumption as against the carriers

who are parties to that proceeding that that rate is reasonable, and that conclusive presumption shall continue for the space of one year. I regard that as a reasonable regulation.

Now, if there is any question arising in anybody's mind that it is not a reasonable regulation, or that the time is too long, because in that time there might be a change of circumstances, any such technical defect—for it is nothing more than that—can be readily cured by providing that any carrier feeling aggrieved by this provision of the law because of some change in circumstances that renders the rate unjust and unreasonable as to him, can apply to the court for a readjudication in the same proceeding; and then provide that when that readjudication is had the rate so readjudicated shall continue for a year from that date. I think you will find that no carrier would ever come in and ask for a readjudication.

Mr. MANN. You give the shipper the same right, I suppose?

Mr. BOND. And give the shipper the same right.

Mr. STEVENS. That would only bind parties to the litigation, would it?

Mr. BOND. You can not bind anybody but the parties to the litigation. And in working out the details of any such proceeding there ought to be a provision that the court could admit any party interested or claiming an interest as a defendant. So that if a community found that there was a proceeding of this kind pending in which its interests were vitally involved, it could apply to the court.

Mr. SHACKLEFORD. Would your scheme provide for the instituting of a through rate otherwise than by the agreement of the carriers?

Mr. BOND. You mean in case there was an existing through rate?

Mr. SHACKLEFORD. No; if the Commission wanted to prescribe a through rate where more than one carrier was involved, would your scheme permit that to be done?

Mr. BOND. You mean to provide a through rate where there is none existing or to change one already in existence?

Mr. SHACKLEFORD. To change one or institute one, either?

Mr. BOND. It has never been decided whether the Commission could institute a through rate or whether the law could institute one. It has been decided that where there is one in existence it is subject to regulation, and after that regulation one of the carriers can not change the character of the transaction by withdrawing from the through rate.

Mr. SHACKLEFORD. Where there is not a through rate, can your suggestions be broadened enough to authorize the Commission or the court to institute a through rate?

Mr. BOND. No, sir; and I do not think that there is any pending legislation that does do that which is constitutional.

Mr. MANN. Suppose the Interstate Commerce Commission under that plan should still fix the rate that each carrier should charge on a through bill of lading, which would practically make a through rate?

Mr. BOND. Yes, sir.

Mr. SHACKLEFORD. Would that compel the connecting carriers to receive goods from one another and carry them through to their desired destinations?

Mr. BOND. That is compelled, so far as it can be, by the third section of the act now. But if you have in mind now the provisions of pending legislation that the Commission where it disturbs a joint rate

has a right to decide what proportions of that joint rate shall be taken by the parties to it, I would like to point out that the defect of that provision as it stands—I mean in the Cooper-Quarles bill and other bills—is that you do not provide any hearing for the carrier on that part of the proceeding, and that is just as much a matter on which the carrier is entitled to a hearing in court as any other, and if that is the exclusive method of determining that fact, then your bill is defective, and if it is not the exclusive method of determining the fact, then you are not accomplishing what you are after. So that there is not any existing measure which provides a practical way to do that.

My suggestion as to the only way to handle a through rate in that case is to enact right from the shoulder that the new rate shall be divided on the same basis as the old one. Then you have a rule, anyway, and if any carrier can say that that rule is not fair, then you have the exceptional case to take care of, whereas if you leave it purely as a matter of agreement, and then leave the Commission to decide in the absence of an agreement, you have not any rule established and the whole thing is in the air.

The CHAIRMAN. That scheme of yours would recognize and legalize the wrongs complained of in the Harvester case, where the switch 300 feet long connecting with another road received 25 per cent of the rate?

Mr. BOND. How was that?

The CHAIRMAN. If you simply legalized that division or recognized that division you would simply perpetuate that form of contract, would you not?

Mr. BOND. It is the question in the Harvester case whether it is a division in fact at all, or whether it is a mere device to give a discriminating rate. If it is a division at all, then there is not any provision of the law, nor is there any provision that you can enact, that will enable you, without providing a hearing, to say what that division shall be. Now, there is a great deal of misunderstanding about those terminal-road cases. If the committee would like to hear anything about them I should like to give my views about them. There are terminal roads and terminal roads. The question is now as to such a case as the chairman presents, whether that is really a railroad at all with which there should be any prorate. That is a question that can be absolutely tested under the Elkins law, because if the sharing of the rate with that road is a mere device, if that road does not in fact perform a part of the transportation which entitles it to a share of the rate, then it is clearly within the provisions of the Elkins Act.

There are terminal roads that are entirely different from that. Let me cite an instance without naming any names. Suppose there is a road, say 40 miles long, and the stock of that railroad is owned by a manufacturing company, say engaged in the manufacture of steel, and under the charter of that manufacturing company that company is authorized to hold the stock of that railroad company and that railroad connects with three or four trunk lines. All the supplies of the manufacturing company must go over that railroad. The railroad is 40 miles long. The railroad company says, "We must have 70 cents on every ton of coke and coal. If you do not give us the 70 cents, you do not get the freight, because this railroad will not accept any less, and all the supplies going to this manufacturing plant must go over the railroad." Now, the officers of that railroad company take the position

that that is an advantage which, under the laws of the State, they are entitled to. Let me say that the 70 cents does not exceed the local charge per ton per mile which they are authorized to make under the State law; but it may be at least 20 cents a ton higher than would ordinarily be given a railroad as a prorate of the through rate. What are you going to do? That railroad says, "We have a position of commercial advantage. We can get our local rate, or very near it, and we are going to take it;" and they further politely remark, "If you three or four railroads get together and say that you will not give us that, we will have you indicted under the antitrust act."

That is a perfectly fair view for them to take. Are they not entitled to that, as a matter of law? How are you going to meet that situation? We can not meet that situation just because you gentlemen here have suspended the laws of trade, have suspended the law that makes the self-interest of one man keep the self-interest of another man from gobbling things up; and those railroads can not protect themselves against that proposition because you have suspended their right of agreement with one another, and that would be the only way to meet it. Congress can not meet it.

Mr. MANN. You have instanced the Illinois Steel Company's case as a suppositious case?

Mr. BOND. I do not say that, whether I have or not.

Mr. MANN. That is a case that is in my Congressional district, and I am perfectly familiar with it. Can not we meet that by giving the Interstate Commerce Commission the right to say what shall be the respective proportions of the through rate?

Mr. BOND. I do not think you can.

Mr. MANN. Of course it is a delicate position for you to be in, because you carry most of the freight.

Mr. BOND. I wish we did.

Mr. MANN. I know you do.

Mr. BOND. But it is a very serious question; I mean from a railroad standpoint; because you once admit that that is a sound legal position that they have got, and it is a sound legal position——

Mr. MANN. As the law now stands.

Mr. BOND (continuing). As the law now stands.

Mr. MANN. I have no doubt of it.

Mr. BOND. And I have very serious doubts whether you can amend the law so as to meet it unless you discriminate against the railroad company whose stock is owned by a manufacturing company, and I do not believe that you can make any such discrimination in the law. You have the situation as it is, and it is a very serious one from the railroad standpoint.

What are we going to do with it? The same thing spreads all over the country, and if you are going to tie these railroads up and suspend their rights of contract and let any manufacturing plant that owns a railroad have that advantage over them the result will be that you will force all large manufacturing plants in this country into the railroad business. They have got to go into the railroad business.

Mr. SHACKLEFORD. Would it not be better to force all of them out of it?

Mr. BOND. That is a very serious question whether you can. That is a question which I do not believe this committee is prepared to

handle under this law. I have not heard any discussion of anything or heard anything suggested in the way of a practical scheme of meeting it.

Mr. TOWNSEND. Suppose the Commission were allowed the fixing of rates?

Mr. BOND. How are you going to do that? Where is the bill that does that? None of the bills proposed now, or heretofore, meet the case at all. The powers conferred to fix rates and to divide joint rates will not enable the Commission to accomplish what they wish in this case.

Mr. TOWNSEND. Suppose we make that. Suppose we give the Commission the power to fix the rate on that road, which it is to charge?

Mr. BURKE. Suppose the rate is a reasonable rate, Mr. Townsend.

Mr. TOWNSEND. I am supposing that it is not. He has shown that it is not.

Mr. BOND. I have not shown any such thing. I am only stating the position.

Mr. BURKE. Suppose it is shown by the railroad commission to be a reasonable rate?

Mr. BOND. They are within their legal rights, absolutely.

Mr. MANN. As a matter of fact, that little railroad—it is only 40 miles long, along the southern shore of Lake Michigan—is one of the most expensively constructed roads in the United States.

Mr. BOND. Absolutely. And I think their legal proposition is sound. And I have been up against it. [Laughter.]

I wanted simply to point out that this suggestion of mine, if it is a question here of saving time and getting a final decision in these matters, is practicable; that whereas under the Cooper-Quarles bill you must have forty days before the case can possibly stand for hearing, with the utmost possible dispatch, and whereas your order without any contest does not go into effect for thirty days, and in case of contest it does not go into effect for sixty days, even if the court does not suspend it—and let me say that under your laws the court has got to suspend it, and you make the act unconstitutional if you say that it can not suspend it, and if it be suspended the whole effect of the act is destroyed—whereas under the Cooper bill you can not have any order go into effect in the first place, even if the court does not suspend it, within less than sixty days. Under the section that I have suggested you will have an adjudicated rate within sixty days, because this court can decide these cases a great deal faster than the Commission can send them to it. The Commission has to do all the preliminary work, and what is more, it has to investigate cases where it finds that there no unjust discrimination or unjust rate, and it is only the other class of cases, those in which there is an unjust rate or discrimination, which go into the court.

The reason you save time is because under all the pending bills there is a complete reversal of the positions of the parties. You start in practically with the Commission or the complainant before the Commission in the position of plaintiff, and then you reverse the whole situation and make the railroad the plaintiff. Now, that is lost motion, waste of time, and that method was only adopted to meet a view of the Commission that if they had to go into all the circuit courts they were not in a dignified position, if they had to go in as plaintiff to

enforce their own orders. Now, if you have a special court, that lost motion is done away with, and there is no use in reversing the situation of the parties, and you can go right into court, and then you have all your records in one place; and you are in the further situation that if you find in the future that this plan does not work fast enough, then you can dispense altogether with the preliminary trials before the Commission, and you can let the Commission go into court simply on their own examination to see if there is something wrong, and further expedite it in that way; and you have all your records as to what has been adjudicated in one place.

I have exceeded my time, Mr. Chairman, I am afraid. I thank you very much.

**STATEMENT OF MR. DAVID WILCOX, PRESIDENT OF THE DELAWARE AND HUDSON RAILROAD COMPANY.**

Mr. WILCOX. If I can have only the hour that remains, Mr. Chairman, I will endeavor to comply with the desires of the committee, of course.

Mr. Chairman and gentlemen, the Delaware and Hudson Company, of which I have the honor to be president, was incorporated by the State of New York in 1823 for the purpose of bringing a supply of hard coal—as they called it in those days, “stone coal”—from Pennsylvania to New York. Its rights were confirmed by the legislature of Pennsylvania very shortly thereafter. I may say that it antedates the law to amend charters, and comes under the rules laid down in the Dartmouth College case, so that it has its interests.

The company has been carried on since that time continuously without a receiver or a reorganization, and as I have occupied my office but a very short period of time—being, in fact, like, I believe, most of the committee, a lawyer—I may say that its conservative management has led to its continued prosperity. During that time it has paid out in wages between, probably, four and five million dollars; in dividends, between sixty and seventy million dollars. It has now about 23,000 employees. The company and its leased companies have about 6,000 security holders. Therefore I may say that there are 29,000 people who are interested, and, with those who are dependent upon them, it is not too much to say that there are 100,000 people who are interested in the continued prosperity of this property. The stock of the Delaware and Hudson Company is very widely distributed. There are 3,800 stockholders, and the average holding of each one of them is \$11,000 at par.

When I applied to the chairman of this committee for a hearing, I did not apply on behalf of the Delaware and Hudson Company, but on behalf of its employees and security holders and on behalf of those who are dependent upon them. My constituency, I may say, is perhaps 100,000; probably that. What has been the cause of the prosperity of this property and upon what depend its 100,000 people? Upon nothing else in the world but the income of the property. Without the income the property is of no value. Without the income there would be no incentive to operate it; and therefore, necessarily, any proposition which tends to place in the hands of the Government, however ably administered, the question as to whether or not this

substantial mass of property shall earn anything, which tends to qualify or limit its earning capacity, affects not the company, for these companies, gentlemen, are of very little real importance. They are artificial persons. They are the means by which the property of the owners is held together and is made productive. That is all there is of it.

If the American people so wish, the corporations may die. But what is to become of the people who are interested in them? What is to become of this enormous mass of property, upon which rests the prosperity not merely of the class whom I have named, but also of those who sell supplies to them, and of the communities through which they pass, and of the communities which will be built up by their extension? It seems to me that that is the serious question, What effect is what you may do here going to have upon the future welfare, productiveness, and value of the greatest single industrial interest of the country? It is a great responsibility, gentlemen. I do not come here as an extremist. If you can devise anything which will be to the benefit of the country as a whole, who will welcome it more than those who are interested in the railroad property? Why should they not? As I said a moment ago, it is the greatest single interest there is in the country. It has eight to ten thousand million dollars' worth of the country's accumulated wealth. As the Delaware and Hudson Company has grown to become a favorite object of investment with estates and institutions which have a more or less fiduciary character, so is it the case with the very large mass of this property generally.

Now, gentlemen, great as I feel my own responsibility with reference to the company with which I am connected, I realize that the responsibility of this committee is very, very much more serious. It may pass an act which shall put it in the power of those who, however well intentioned they are—and I do not wish to join the super-heated gentlemen who sometimes want to have the Interstate Commerce Commission abolished because they are not doing anything, and I will say that they are not railroad men, that I ever heard of—yet, having the power, may do great harm. I do not share in that feeling toward the Commission. But, as I say, gentlemen, you may pass an act that will so compromise the value of the property, and the prosperity of the communities of the country, that it will bring widespread disaster. On the other hand, you may pass an act which will fail of operation. Some people say that the present act has not accomplished what was hoped, although I do not agree with that exactly. But you may do the same thing, not intentionally but unintentionally, and the act which you may pass may become a gold brick in legislation. And there are those two great possibilities. You may pass an act which will so compromise the value of the greatest mass of accumulated resources of the country that its efficiency will in a measure cease, or at any rate become less, or you may pass an act which will fail of accomplishing the desired results, and this agitation may go on, stimulated and kept on foot in the methods which you gentlemen know so well, apparently ad infinitum.

What I say, gentlemen, is that it is a very, very serious moment when an Anglo-Saxon government undertakes the charge of people's money and says how much they shall earn by the exercise of their con-



stitutional rights of liberty and property. And it should be recognized that possibly we are at the parting of the ways, and that if this be done it will go on until those constitutional guaranties have but little value, and the only profession worth exercising in the country will be that of holding office in some administrative board.

I do not want to exaggerate, but the committee is certainly aware of the fact that Congress has no special power over carriers. What the Constitution provides is that Congress may regulate commerce among the States or with foreign nations. The shipper is engaged in interstate commerce just as much as the carrier. The manufacturer who ships is engaged in interstate commerce equally with the carrier, and if the plan is to be adopted that the earnings of those who are engaged in this interstate commerce are to be regulated by a governmental and administrative board, it applies just as much to the shippers as to the carriers. There is no substantial difference between them. It applies to everybody. So that it is, as I say, a question that affects the entire community.

The CHAIRMAN. You think there is no difference in the legal status of a common carrier and a shipper?

Mr. WILCOX. Of course, Mr. Chairman, I trust that I have practiced law long enough to have some idea of what the difference is.

The CHAIRMAN. You said no substantial difference.

Mr. WILCOX. No, sir; there is no substantial difference in the power to regulate. The common carrier is bound to charge reasonable rates and not to discriminate. Now, when you have got beyond that I do not think there is a great deal of difference. The common carriers do not derive their franchises from the Federal Government after all; they derive them from the States, and I do not believe that there is any substantial reason for discriminating between a corporation which is engaged in interstate commerce and anybody else who is engaged in interstate commerce. In fact, I think the right to liberty and property, which is guaranteed by the fifth amendment, is a right of a corporation as much as an individual, and my impression is that it has been settled by the Supreme Court of the United States.

Mr. SHACKLEFORD. This legislation is not aimed at corporations any more than individuals, if individuals are engaged as carriers in interstate commerce, is it?

Mr. WILCOX. I think it is a fair comment; but really I think your idea agrees with mine—that is, that corporations and individuals stand on the same footing.

Mr. ADAMSON. Does not the power of Congress over commerce belong equally to anything and anybody engaged in interstate commerce?

Mr. WILCOX. I have not the slightest doubt about it.

Mr. ADAMSON. Whether they use wagon teams or railroads, or whether they are individuals or corporations?

Mr. WILCOX. Yes, sir.

Mr. MANN. But there is a distinction between the power to regulate the rates of common carriers or common warehousemen and the power to say what persons shall sell their goods for? Is not that distinction drawn by the courts?

Mr. WILCOX. If the gentleman please, I thought that I made that clear, or tried to, that the carriers are bound to exercise their public

employment at reasonable prices. But now we have the new doctrine which has recently arisen, that to engage in interstate commerce generally is to be a privilege. If that is so it completely obliterates any such distinction.

Mr. MANN. I do not think there will be any such result as that, fortunately.

Mr. WILCOX. Well, what I say on that is merely in the nature of pointing out that that was what you are coming to. This is simply the beginning.

Mr. ADAMSON. Is not the just and practical criterion as to what prices are charged under similar circumstances at other places?

Mr. WILCOX. I think that is probably the best test, although the Interstate Commerce Commission seems to think otherwise.

My time is brief, and I will pass on. I will say that Mr. Spencer and myself have prepared a brief, which I will file with the committee, which I shall venture to hope that the committee will read, because it endeavors to set forth consecutively our views on the whole subject in a manner which it would be tedious to pursue here in argument, even if it were not impracticable for lack of time.

The CHAIRMAN. What business is the Delaware and Hudson Company engaged in?

Mr. WILCOX. In the railroad business and in mining coal.

The CHAIRMAN. In what proportions?

Mr. WILCOX. You mean the proportions of—

The CHAIRMAN. What proportion of its revenue comes from the production of coal and what proportion from its carrying of coal or from its business as a common carrier?

Mr. WILCOX. Of course it does a large general business in addition to the coal over its railroads.

The CHAIRMAN. Yes.

Mr. WILCOX. And I should say that from the mining of the coal its revenue is a little over 40 per cent, and the balance is from its business generally.

The CHAIRMAN. You spoke of the value of this property as from eight to ten thousand millions.

Mr. WILCOX. No, sir. The value of the railroad property of the country is from eight to ten thousand millions, I said.

The CHAIRMAN. I thought you said the value of this railroad property.

Mr. WILCOX. No, sir; we are not as rich as that, Mr. Chairman. That is what I put the value of the railroad property of the country at. Of course the securities outstanding are \$12,000,000,000, but there is more or less duplication by reason of the treasury assets held by the company, so that I think it would be fair to say \$12,000,000,000 as the outstanding securities.

I will just venture to say this, gentlemen, that when I took office as president of this company, which was less than two years ago, I had been practicing law then for thirty years, and I suppose that I am still a good deal more of a lawyer than a railroad man. I believe most of the committee are lawyers, and therefore we may sympathize with each other. When I took up the office various gentlemen who had been engaged in the railroad service for a great many years, whom I met, said: "Now, we have one piece of advice

to offer to you, and only one." I said: "That is very kind. I should be glad to have more, but I should be obliged for the one. What is that?" They said: "Go slow." And, gentlemen, I have found that the most valuable piece of advice that I could possibly have had. So I want to say to the committee, not merely as a railroad man or as a lawyer, but as an American citizen, that inasmuch as this matter has been forced upon the committee by an agitation which has been largely based, as I conceive, upon misapprehension, and if I had the time I think I could demonstrate that to the committee—I want to urge the committee with the utmost earnestness which is in my power to go slowly about this thing, because a step once taken can not be retraced, and unless it is the right step, as I said a while ago, it may lead to great disaster or it may lead to cruel and exasperating disappointment. Do not do anything until you are sure that you are going to do something effective. That is what the railroad owners of the country would say to you. Do not be in a hurry and do not pass statutes because you think people want something done. Be sure that you are doing something for the good of the country as a whole, not merely for the good of the special regions which are particularly exasperated.

And I will say here we know very little of these conditions in the East—almost nothing. Do not do something merely for the sake of doing something. This is too serious a question for that sort of treatment. If you do anything, if in your ripe judgment, in your wisdom, you conclude that it is desirable to do something, do something which will have value, not something with which your names will be associated either as a failure or as a disaster.

I said that I was not one of those who believe in abolishing the Interstate Commerce Commission. Of course the great benefit of that Commission has been the settlement of claims without controversy. In that manner it has settled over 90 per cent of the claims which have come before it. That is the business way of carrying on business, for the parties to settle. I do not know of any business, gentlemen, which is carried on successfully by third parties who have no interest in the ultimate result, and no business which is carried on by lawsuit. Business by lawsuit would be a thing to be abhorred, a thing which would be impossible. That is where the Interstate Commerce Commission has been useful. The difficulty has arisen out of the other 10 per cent. I do not think so because they quote what Judge Schoonmaker said as showing that the Commission then realized that it had not power to fix rates. That was the construction given to the language of Commissioner Schoonmaker by Judge Brewer.

I suppose that the committee, by the discussions that have been had, has been fully advised of the fact that upon the record there is no question of the reasonableness of rates per se. Upon a brief which I shall have the pleasure of filing that matter is fully argued out. It admits of no question. Even as those advances from 1899 until 1903, regarding which the Commission reported last year to the Senate—even as to them the Commission itself says that it does not claim that they were unreasonable. In an article in the North American Review, which was written by one of the most productive of the Commissioners last June, the same statement was repeated, that he did

not claim that they were unreasonable, but simply that the Government ought to have the right to fix them. That is simply and baldly that the Government should fix future rates. There is nobody complaining; there is no case and there has never been a case, as I have no doubt that the committee has been informed over and over again, of unreasonable rates which has been sustained; but the position of the Commissioner who wrote this article was that, as a matter of right, the Government should always intervene in these circumstances.

Now, that advance in rates amounted to what? Thirty-nine thousandths of a cent per ton per mile. And it is interesting to notice that in the report for 1902, in commenting upon the relation of rates between 1898 and 1902, the Commission uses the expression that the rates were about the same. Now, the difference between those two years consisted of a difference of forty-one thousandths of a cent, and the Commission said that the rates were about the same, and the Commission said that the increase in gross earnings was due to the increased volume of traffic. When they came to comparing the rates of 1899 and those of 1903, the difference was thirty-nine thousandths of a cent, two thousandths of a cent less than they had been between 1898 and 1902, when the Commission said they were about the same. Nevertheless, this difference of thirty-nine thousandths of a cent was described as having made enormous additions to the expenses of railway transportation, although a difference of forty-one thousandths of a cent, taking the two previous corresponding years for purposes of comparison, was described as leaving the rates about the same. I suppose that the committee has also been fully advised of the fact that the Elkins law covers the subject of rebates. The Interstate Commerce Commission has so said in its last two annual reports, that that subject is fully covered. So that I shall not stop to talk about that.

But the matter to which I wish to call the attention of the committee is the matter of discrimination between localities. As to that question of discrimination between localities, that is a matter, gentlemen, which you will always have with you. It is a question that arises naturally from the desire for commercial advancement. It is the natural result of commercial rivalry. I have no doubt you remember the language of the Supreme Court, in which it points out, with a great deal of elaboration and vigor, that it is not all discriminations and all preferences which establish a cause of complaint, but that they must be undue or unjust, and that the existence of preferences can never be overcome. Claims that preferences exist or are undue or unjust, as I have just said, arise from the feeling which everyone has that he desires equal treatment with his neighbor, and that his place desires equal treatment. They are difficult questions. They give the railroad companies a great deal of concern. They are questions between the localities rather than with the railroads, and they are questions which affect the railroads only, as they almost invariably lead to a reduction of their revenue.

The efforts of the traffic officials of the road to meet the necessities of the shippers and to enable their manufacturers and shippers to ship to farther markets all the time are what have led, more, in my belief, than anything else, to the downward course of rates, which has been practically continuous. When you consider the increase in the cost of materials in the past few years, it is not too much to say

that that has been a continuous course. The traffic official is constantly endeavoring to enable his own patrons to reach farther markets. Now, there can not be any question that that encourages competition, enables the consumer to have the benefit of constantly increasing sources of supply, and yet, naturally, when the dealers in the farther markets find that a new element of competition has entered they claim that they are prejudiced, and that the first market is receiving an undue preference.

On this subject it is worth while to see what the Interstate Commerce Commission has said. They say:

In view of their opportunities and the temptations to which their traffic officers are exposed. It is perhaps not too much to say that the obligations of neutrality in this regard are usually observed, and that discriminations of this character are not often the subject of complaint.

That is from the report of the Commission for 1895. They say further:

It is worth observing that some, at least, of the most important controversies involving the rates and methods of railway carriers are rather between competing communities or producing regions than between rival lines of railway. Railway development has extended far beyond the point at which any of the greater systems find their interests so identified with a single community as to feel wholly indifferent to the demands and needs of all competing communities. Indeed, there may be entire sincerity in the contention, on the part of the officers of a great system, that any adjustment which satisfies the rival communities which it serves can not be seriously objectionable from its own point of view. In such degree as this contention may be sincerely advanced the carrier becomes a relatively unimportant factor in the struggles of rival localities.

That is from the report of 1904, page 28. But the difficulty about it is that these struggles constantly lead to the tearing down of the revenues of the carriers, and therefore it can scarcely be said that the carriers are relatively an unimportant factor, from their own point of view, because when the Commission finds that a rate is of such a character as to establish a preference, it never raises a rate, but always reduces one or the other rate. I have often thought that that is a serious constitutional question. When they find, for example, that a rate from A to B is reasonable, but that the rate from C to B is lower, they lower the rate which has already been found to be reasonable—that from A to B—and in that manner they compel the carrier to take what is less than a reasonable rate. It is a question which will arise at some time, and it seems to me raises the question whether the carriers are receiving the returns to which they are entitled.

Mr. SHACKLEFORD. In such a case do you think it would be fair to the public and the producers and the shippers to compel a carrier to raise a lower rate if it were a remunerative rate at the time?

Mr. WILCOX. I think it is taking the property of the carriers without due process of law, to compel it to accept an unreasonable rate in the first instance.

Mr. SHACKLEFORD. Would it not be quite as unjust to compel another carrier to raise a remunerative rate to solve the situation?

Mr. WILCOX. I do not think it would.

Mr. SHACKLEFORD. Would it not be unjust to compel one carrier to divide its traffic with another carrier that could not secure that traffic by fair competition?

Mr. WILCOX. I think it is the constitutional question of taking property without due process of law.

Mr. ADAMSON. If one rate is not unreasonably high, and the other is not unreasonably low, they are both reasonable, are they not?

Mr. WILCOX. Yes, sir; but that does not make the first rate, the first unreasonably high rate, as reduced, unreasonable.

Mr. ADAMSON. And yet it might be sufficient to deter a court or tribunal from compelling a carrier, against its own sound judgment, to depart from a rate which it finds profitable and on which it can hold its business.

Mr. WILCOX. It is a pretty difficult question.

Mr. ADAMSON. I think that is an easy question.

Mr. WILCOX. You think it is an easy question?

Mr. ADAMSON. Yes, sir.

Mr. WILCOX. What is it you want me to answer? Do you want me to answer it?

Mr. ADAMSON. I replied to your suggestion that it might be sufficient to deter a court from compelling a carrier, against its judgment, to raise a rate.

Mr. WILCOX. I think the court would very likely come to that conclusion. But would it be sufficient to prevent it from lowering a rate which the court had found to be reasonable? At best I can not see how. Really, the serious question is how this change will operate as a future system. And now I want to read to the committee a few expressions of the Commission, and in reference to the operation of this system in the future:

To give each community the rightful benefits of location, to keep different commodities on an equal footing, so that each shall circulate freely and in natural volume, and to prescribe schedule rates which shall be reasonable, just to both shipper and carrier, is a task of vast magnitude and importance.

That collection of phrases I have no doubt the members of the committee are very familiar with. It first made its appearance in the report of 1893, and has gone on echoing down the corridors of time until its last appearance was in an address which the President delivered before the economic association in Chicago this season. What does it mean. I find sometimes, when I have been sitting up in the lone hours of night with my conscience and a cigar, perhaps, and the Quarles-Cooper bill, this come before me, and I have thought of littel Alice in Wonderland when the form of Jabberwocky had been repeated to her, when she said "It sounds very pretty and seems to fill my head with ideas, but I don't know exactly what they are." So it is with this. It says "To give each community the rightful benefits of location." The reasonable rule is that there shall be no preferences.

Mr. ADAMSON. The fundamental error, in my mind, is that it ought to have said "take away from those communities a natural benefit"

Mr. WILCOX. The gentleman differs from the Interstate Commerce Commission immediately. It says "to keep different commodities on an equal footing." What commodities are to be kept on an equal footing? Are molasses and pig iron to be kept on an equal footing, or what does that mean? It says "so that each shall circulate freely and in natural volume." That is to say, that the Interstate Commerce Commission or some other branch of the Government is to

determine what is the natural volume in which commodities are to circulate. Do you think it is possible for anything to determine that except the natural laws of supply and demand, and do you think there would be much profit in an effort of that kind? Suppose anyone were charging a jury in a case where there was no question of facts, and it would be a question of law as to what should be the natural volume in which commodities were to circulate; do you not think you would have difficulty in framing that charge? The expression of the Commission as to commodities circulating freely has an anomalous sound, but I suppose it means keeping them circulating without restraint—without charge.

The Commission goes on in the report for 1895 to say:

No one who understands the intricacies of transportation would care to assert that the determination of a just rate, or the decision as to what constitutes discrimination, is an easy task. To some extent the principles upon which taxation rests must be allowed in fixing a just rate; to some extent the result of the rate upon the development of industries must be taken into the account in all decisions which the Commission is called upon to make; to some extent every question of transportation involves moral and social considerations, so that a just rate can not be determined independently of the theory of social progress.

The committee will observe that there is nothing said there about reasonable compensation to the owners of the railroads, or the revenues of the company. Now, gentlemen, is that practical? Is the fixing of rates in that method one which would be safe? They say "to some extent the principles upon which taxation rests must be allowed in fixing a just rate." But does anyone know what the principles are upon which taxation rests? I think there are about as many as there are States in the Union. I never was able to find that it rested upon anything but the construction of the statutes where the tax was imposed.

Mr. SHACKLEFORD. And the necessity for revenue?

Mr. WILCOX. Yes, or the amount of taxation that they could stand. That seems to be a factor as much as anything. They say, "To some extent the result of the rate upon the development of industries must be taken into the account." That is what traffic officials are always taking into account, the development on their own lines. But here you have one object, that is to develop the industries of the country. If you should develop on one line, you would probably dwarf those industries upon another line. The development of what industries is to be considered? Is there anything definite about that way of putting it?

Again they say, "To some extent every question of transportation involves moral and social considerations." Now, gentlemen, this is a question of taking people's property. Are moral and social conditions to govern? We all, I have no doubt—I know I do—value moral and social considerations at their proper valuation and recognize where they apply; but do they apply to the constitutional guaranty of property?

Again, they say, "so that a just rate can not be determined independently of the theory of social progress." What in the world does that mean? What is the "theory of social progress?" Is it Henry George's theory of social progress or the socialist's theory of social progress, or the Middle Age theory of social progress? What does it mean, anything? It means nothing tangible.

I must hurry along. Again, the Commission says:

Within certain limits, it is good policy for the railway manager to increase his tonnage, even at the expense of reducing the rate per ton. Just how far this rule applies no one can tell.

How far it is good policy to increase the tonnage at the expense of reducing the rate per ton no one can tell. Then they say further:

The merchant who buys an article for a definite price knows when he sells it whether he makes or loses by the transaction; and the manufacturer, as a rule, has a pretty accurate idea of the cost of production, but the railroad operator can not ordinarily say whether he should or should not as a matter of policy take traffic at a certain price.

If that be so, can the lawyers who constitute the Interstate Commerce Commission say so? Can they say whether the interests of the property owners which will be in their hands will be served by taking traffic at a certain price if even the railroad operators can tell it only by certain rules which govern the transaction of business generally? They further say:

The freight rate is a complex problem when applied to almost all competitive traffic. Very few people not acquainted with the subject have any idea how difficult the solution of that problem is.

And then the report for 1903 of the Commission says this:

It is often difficult to say what constitutes a reasonable rate, and more difficult to give in detail the reasons that lead to the conclusion reached; although the Supreme Court of the United States has given certain rules by which to test the reasonableness of transportation charges, and although the Commission has endeavored to apply those rules, yet whenever it has interrogated railway officials as to whether or not they are governed by them when making rates of transportation, they have invariably answered in the negative and said that to do so would be impracticable. The carriers do not apparently possess the necessary data for that purpose, and there is at present no other source from which the Commission can obtain such data.

As to that I would say that asking the traffic officials whether they were taking their own property without due process of law seems a little absurd, because the rules which were laid down by the Supreme Court were to prevent property from being taken in invitum without due process of law. A man can give away his own property, and that question does not arise; but when the rates are sought to be made by superior force, then the question does arise, and then the Commission says it is impossible to follow the rules which the Supreme Court has laid down. Now, that is an extraordinary situation. Just imagine, brethren of the bar, what a field of litigation that would be. Because these decisions of the Interstate Commerce Commission will be thoroughly probed, and then it would appear that according to their own statement they had no relation whatever to the rules that the Supreme Court has announced on that subject.

Mr. TOWNSEND. May I ask you a question?

Mr. WILCOX. Yes, sir.

Mr. TOWNSEND. Do you believe that the Government, through a commission, or any other body, should have the right to inquire into the reasonableness of a rate?

Mr. WILCOX. Yes, sir; certainly. I said on the start that I believed in a commission.

Mr. TOWNSEND. That the Commission should have that power?

Mr. WILCOX. Yes, sir



Mr. TOWNSEND. Should they have the right in determining that to inquire into the earnings of the road to determine what the road is earning?

Mr. WILCOX. Mr. Committeeman, I would plant myself on what Judge Harlan said in the case of *Smith v. Ames* on that subject. That is the most thorough statement I know on the subject, and I believe what he said. I will read it if you want to hear it.

Mr. TOWNSEND. You could answer my question if you understand him as you do, just as I have put it to you.

Mr. WILCOX. The earnings of the road?

Mr. TOWNSEND. Yes, sir.

Mr. WILCOX. That is my view, certainly. That is what the case of *Smith v. Ames* said. I wanted to answer your question compendiously by referring to that.

Mr. TOWNSEND. I do not care for you to go into that.

Mr. WILCOX. Taking into account the earnings of the road? I suppose so.

Mr. TOWNSEND. What would be necessary in order to fix a reasonable rate?

Mr. WILCOX. That is a question how far that would control in cases of roads which do not have earnings. There has got to be an original uniformity of rates.

Mr. TOWNSEND. That would involve the question of taxes that you have referred to, whether they were paying a proper proportion of their taxes.

Mr. WILCOX. I do not know whether it would or not; the systems of taxation are so different.

Mr. TOWNSEND. And that would involve a question of the faithfulness of the reports of the railroads as to their distribution of their earnings and operation, and so forth.

Mr. WILCOX. Yes, sir; and would probably involve an inquiry as to what are betterments and what are renewals.

Mr. TOWNSEND. Is it your opinion that the railroads are fair with the people in making those statements of the apportionment of earnings?

Mr. WILCOX. My judgment would be that too many things are called betterments which are really renewals. I do not think that they are conservative enough about it.

Mr. TOWNSEND. You think they are treating themselves unfairly in those reports?

Mr. WILCOX. Yes, sir; every man who makes a report likes to show that he has strengthened the property. In that respect I think they call things betterments which are probably merely renewals.

Mr. TOWNSEND. Now, one more thing, which is not just pertinent to this, but in order to understand your relation to this I will ask you this question: You have been quite interested in opposing the enlargement of the powers of the Interstate Commerce Commission, and especially as representing the principles set forth in the Quarles-Cooper bill?

Mr. WILCOX. Yes, sir.

Mr. TOWNSEND. And you had something to do with getting the withdrawal of indorsements of people who had signed the petition of "Freight?"

Mr. WILCOX. Yes, sir; I had something to do with that.

Mr. TOWNSEND. What did you do in connection with that?

Mr. WILCOX. Well, let me see. Perhaps I ought to say this, that I have always lived in New York, so that I know a number of these gentlemen myself, and I suggested to gentlemen who knew them, whom I did not know, that they should bring the matter to their attention, and made suggestions to them on the lines that I have suggested this morning.

Mr. TOWNSEND. And there was a formal effort made to get them to withdraw their names?

Mr. WILCOX. There was not a formal effort. I think that I have told you what I did. There was one of those concerns which was a shipper on our line, and I had never heard any complaint from them, and I wrote them and asked them whether they had any complaint. That is one of the most important concerns in the State of New York. They wrote that they had not any complaint, and very strongly commended our station agent and said that he was a first-rate man, and they hoped that he would continue there; and they said on further consideration they believed that the legislation proposed would be undesirable, and they did not believe in Government action on these matters.

The way that I came to take that matter up was this: I received from Freight a letter addressed to myself, inclosing a copy of the petition with the request that I would sign the petition and subscribe to the paper. I did subscribe to the paper, and when I read the Quarles-Cooper bill I thought that it was very undesirable. I make no question about saying that; that is what I came here to say. I found also the petition contained a misstatement to the effect that the object of the Quarles-Cooper bill was to restore the Interstate Commerce act to the condition in which it was originally passed. Now, that was an entire misconception, because there had never been any change in the commerce bill, and the result of the judgments of the Supreme Court was to construe it, and we all know that—you are a lawyer, are you not?

Mr. TOWNSEND. A kind of a lawyer.

Mr. WILCOX. Like myself. That did not emasculate the act or eliminate sections or anything of that kind. It construed the act as Congress originally passed it. This petition also stated that the object of the bill was to restore the interstate act to its original condition.

Mr. TOWNSEND. You understood that it was to restore these rate-making powers to the Commission as they have been originally given in the act? You understood it that way?

Mr. WILCOX. It did not say so.

Mr. TOWNSEND. You understood it that way, did you not, that it was to restore these rate-making powers, as the Commission supposed it had those rights, as it has shown by attempting to exercise those powers?

Mr. WILCOX. If you could have explained that as the meaning of the petition I think they would have understood it more fully than it was possible under the circumstances for them to understand it. Have I answered all that you wanted me to?

Mr. TOWNSEND. Yes, sir; thank you.

Mr. WILCOX. The most dangerous thing about this matter, it seems to me, is the provision as to fixing the just relation of rates. Before I take that up, however, I assume that the committee is thoroughly aware now that the bill gives the Commission the power to fix rates, or, as was said in the maximum-rate case, all rates could be fixed in one proceeding. It is therefore inconsistent with the language of the President's message, which is to the effect that it is not desirable to give a general rate-making power to the Commission. It has been claimed in recent publications by Mr. Bacon and Mr. Moseley that nothing of the sort was sought, and yet we have the language of Judge Brewer, holding, in terms, that that would be the necessary effect of this change.

Now, you take the just relation of rates. The illustration of that in the differential case, I believe, has been presented to the committee, where the Commission wrote an opinion saying that the question was how far New York was entitled to its commercial supremacy—how far it was to be permitted to retain it—and stating that the policy of the country was that the trade should be distributed in different ports, and the Commission proceeded to make an award affirming the differentials in part, in the face of that constitutional provision that no regulation of commerce or revenue shall give any preference between different parts of the United States.

In absolute flat disregard of that, just lately, the Commission has said that it is no part of its functions to equalize natural advantages by adjusting rates. So that those varying rules could be applied, apparently, according to the fancy of the Commission, as occasion might arise. In one case it might be held that the commerce of a place like Chicago, for instance, was to be distributed, and in another case it might be held that it was not within the function of the Commission to equalize natural conditions, because it is on record both ways. Suppose it could do this; suppose that it could equalize such advantages? Is there anything that would stop competition more than that? Is there anything that would limit the productive activities of various commercial centers more than the effort to give to each one some little territory in which it had a natural advantage, because it was near at hand, perhaps, and to keep everybody else out? Because that would be the effect of it if such a system could be carried out. I doubt whether it could be, but if it could be carried out it would absolutely limit competition and prevent the process which is going on all the time of developing business, so that manufacturers and carriers can reach farther markets. That will be at an end. So, too, under the Quarles-Cooper bill, a condition of rigidity of rates would arise as soon as the Commission had acted, because the rates under the provisions of that bill can not be changed except by the action of the Commission itself—not by the court even, but only by the action of the Commission.

And that condition would constantly go on. Rates would gradually become fixed everywhere, and the enterprising manufacturer who wanted to reach another market would be shut out from doing so.

The CHAIRMAN. The hour has arrived at which we must adjourn. This committee is not allowed to hold its sessions during the sitting of the House.

Mr. WILCOX. I am greatly obliged to you and the gentlemen of the

committee, Mr. Chairman, for hearing me, and, as I have said, I expect to file a brief with you right away.

Thereupon (at 12 o'clock m.) the committee adjourned until Monday, January 23, 1905, at 10.30 o'clock a. m.

*The interstate commerce act—The legislation now proposed is unnecessary and, if effective, would be very dangerous—The remedy for any grievance lies in thorough enforcement of the law rather than in further experimental statutes.*

THE SCOPE OF THE INTERSTATE COMMERCE ACT HAS NEVER BEEN DIMINISHED BY THE COURTS.

It is sometimes said that the preliminary debates in Congress indicate an intention that the scope of the interstate commerce act should be either broader or narrower than that which it now has. But it has often been ruled by the Supreme Court of the United States that expressions used in such debates have no force in determining the meaning of statutes—that meaning is to be gathered solely from the language of the statute as finally enacted (3 How., 224). Accordingly, nothing of the sort ever had the slightest bearing upon the meaning of the interstate commerce act. The powers of the Commission which it created were those only which were specified by the language of the statute.

The act provided that rates should be reasonable and there should be no preference, and it was made the duty of the Commission to enforce these rules. Under settled principles of construction these provisions referred to action regarding existing conditions, and not to establishment of rates or regulations for the future. Accordingly, promptly after the act became effective, the Commission decided that it had no power or jurisdiction regarding future conditions. Commissioner Walker said as to the suggestion that the Commission could "construe, interpret, and apply the law by preliminary judgment" (1 I. C. R., 19), that "a moment's reflection will show that no such tribunal could be properly erected. Congress has not taken the management of the railroads out of the hands of the railroad companies. It has simply established certain general principles under which interstate commerce must be conducted." (Id., 20.) Commissioner Cooley said that in case the Commission had preliminary power to suspend the long and short haul provision it "would, in effect, be required to act as rate makers for all the roads and compelled to adjust the tariffs, so as to meet the exigencies of business, while at the same time endeavoring to protect relative rights and equities of rival carriers and rival localities. This, in any considerable state, would be an enormous task. In a country so large as ours, and with so vast a mileage of roads, it would be superhuman. A construction of the statute which should require its performance would render the due administration of the law altogether impracticable, and that fact tends strongly to show that such a construction could not have been intended. \* \* \* No tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law." (Id., 280, 281.) Commissioner Schoonmaker said that the Commission had no power in any case to fix rates for the future, but "its power in respect to rates is to determine whether those which the roads impose are for any reason in conflict with the statute." (1 I. C. R., 357.) This language was later cited by the Supreme Court (167 U. S., 570) as showing that the Commission at first did not deem itself to be possessed of rate-making power.

After a time the Commission changed its attitude in the matter and made various attempts to regulate future conditions. This course naturally led to litigation. It is frequently said that the Commission exercised this power for ten years without objection or suggestion that its course was unauthorized by law.<sup>a</sup> (Annual report of the Commission for 1897, p. 11.) This statement

<sup>a</sup>As for example, too, in *The Transportation Tax*, issued by the Cattle Growers' Interstate Committee, Denver, Colo., 1904, p. 26.

As will be shown below at length, when the Commission made the attempt to establish future rates by wholesale (4 I. C. R., 592), that attempt was promptly resisted in the courts, and as soon as the courts could act the Commission was held to have exceeded its authority. (162 U. S., 184; 167 U. S., 511.) The rules thus laid down by the Supreme Court were foreshadowed at circuit as early as 1889 and 1890. (37 Fed. Rep., 567; 43 Fed. Rep., 37.)

It was settled in 1889, by a judgment of the eminent Judge Howell E. Jackson (37 Fed. Rep., 567), that the Commission had none of the character of a court and its decisions could be enforced only through aid of the judicial tribunals, and in this view the Supreme Court, through Justice Harlan, later concurred. (154 U. S., 485.)

It is interesting to recall the language of Judge Jackson, which was as follows:

"The functions of the Commission are those of referees or special commissioners appointed to make preliminary investigation and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the Commission may be regarded as the general referee of each and every circuit court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the act. It is neither a Federal court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings." (37 Fed. Rep., 613.)

An effort was made in the Fifty-second Congress (Senate bill No. 892) to change these rules by giving the Commission judicial character, but the effort was not successful. Shortly (in 1894) the Commission sought to fix future rates upon an extensive scale (4 I. C. R., 592) and brought suit to enforce this action. In due course this suit reached the Supreme Court of the United States. A decision upon the subject was first made on March 30, 1896. (162 U. S., 184, 196, 197.) The court said:

"It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate in a given case depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable. \* \* \* Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

The last sentence was quoted from a case decided by Judge Jackson at circuit on August 11, 1890 (43 Fed. Rep., 37), and affirmed by the Supreme Court in 1892 (145 U. S., 263).

The question was again before the Supreme Court upon May 24, 1897, in an action brought by the Commission. (167 U. S., 479.) Regarding the claim that the Commission had power to fix rates for the future in a case where it had held the existing rate unreasonable, the court said (p. 509): "The vice of this argument is that it is building up indirectly and by implication a power which is not in terms granted." Accordingly it repeated the language quoted just above and said further:

"Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates, either maximum or minimum or absolute. As it did not give the express power to the Commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what, in reference to the past, was reasonable and just, whether as maximum, minimum, or absolute, and thus enable it to obtain from the courts a peremptory order that in the future the railroad company should follow the rates thus determined to have been in the past reasonable and just."

In response to the suggestion that this construction of the act rendered the Commission useless, the court said (p. 506):

"But has the Commission no functions to perform in respect to the matter of rates; no power to make any inquiry in respect thereto? Unquestionably it has,

and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but in all things that equality of right which is the great purpose of the interstate-commerce act shall be secured to all shippers. It must also see that that publicity which is required by section 6 is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions and enforcing obedience to all these provisions tends, as observed by Commissioner Cooley in *In re Chicago, St. Paul and Kansas City Railway* (2 Int. Com. Com. Rep., 231, 261), to both reasonableness and equality of rate contemplated by the interstate-commerce act."

In these constructions of the interstate-commerce act all of the justices of the Supreme Court concurred at various times, with the exception of Justice Harlan.

It has since been pertinaciously asserted that these decisions either read into the act something which was not in it or read out of it something which it originally contained. Apparently in order to lend emphasis to this claim, terms grotesque in the discussion of judicial decisions have generally been employed. Thus a recent writer in the *North American Review* speaks of the Supreme Court as having "annulled" and "set aside" the act and "eviscerated" the Commission; it has frequently been said that the court "emasculated" the statute; the Commission speaks of the courts having made "discoveries" contrary to the general understanding (Annual Report for 1897, pp. 6, 9), by which sections of the statute were "eliminated" and "stricken from the act" (Id., p. 43), and refers to the effect of these adjudications "in defeating the purposes of the act" (Annual Report for 1898, p. 5; Annual Report for 1901, p. 5), and the Commissioner of Corporations, in his recent report, says that "the force of the interstate-commerce act has been seriously weakened by judicial interpretation."

These fashions of speech, if serious, are founded upon misconception of the processes of jurisprudence. The act contained no provisions in terms authorizing action in regard to future conditions. Accordingly, the Commission promptly held that it had no power in that regard. Thereafter the Commission adopted a contrary view and sought to exercise control over future rates. Thus it became necessary for the Supreme Court to decide which view was sound. It decided that the view first adopted by the Commission was the correct construction of the statute. This, of course, settled by authority the meaning of the act as originally passed. It took nothing therefrom and added nothing thereto. The court decided merely that nothing contained in the statute as it was passed in 1887 conferred any power regarding future rates; no more and no less.

It is therefore idle and foolish to speak of these decisions as having in any way qualified the act as Congress passed it.

#### PROPAGANDA FOR FURTHER LEGISLATION.

The action of Congress as thus finally construed was not accepted in all quarters as sufficient. A propaganda was at once set on foot for further legislation increasing generally the powers of the Commission. The statement has often been made that this movement originated largely with and has been kept alive by the Commission itself. This statement is supported by the facts that in each of its annual reports since these decisions of the Supreme Court the Commission has vigorously criticised those rulings and urged legislation for the purpose of enlarging its powers, and has generally submitted drafts of statutes for that purpose; that at each session of Congress one or more acts of the sort have been introduced, with its approval; that members of the Commission have appeared before Congressional committees and strongly advocated such legislation, and have urged the same in numerous articles, addresses, and interviews; that one of the Commissioners attended and urged such action and submitted a draft of an amended statute at the formation upon November 22, 1899, of what

is now known as the Interstate Commerce Law Association—the organization which is principally active in support of the legislation now proposed, and that by formal order on December 8, 1899, the Commission instructed its secretary to “cooperate assiduously” with any mercantile or agricultural organizations in efforts to secure the result sought and especially the passage of the bill to which reference has just been made (Senate bill 1439, 56th Cong., 1st sess.),

By a circular letter dated February 3, 1900, the secretary of the Commission accordingly stated that said bill was designed to give to the Commission “the authority intended to be conferred by Congress when the bill was originally enacted; that the shippers of the country, with the approval of the Interstate Commerce Commission, seek such an amendment as will empower the Commission to proceed on the lines and to the ends contemplated by the original act; that it is respectfully suggested that (the person addressed) take action expressing (his) approbation and support to the Senators and Representatives from (his) State, and to the Committees on Interstate Commerce, and that the secretary would be pleased to be advised of any action taken in the premises.” Such action has followed naturally from the view that the “purpose of the act was to provide a means by which the public could array itself against the carrier.” (Annual Report for 1897, p. 19.)

The Commission, too, has every year taken Congress and the courts severely to task for failing to agree with its views. The decisions regarding the statute have rendered “its enforcement as a remedial statute practically impossible.” (Annual Report for 1897, p. 6.)

“Nearly every essential feature of that act has failed of execution.” (Id., p. 37.)

“By virtue of judicial decision, it (the Commission) has ceased to be a body for the regulation of interstate carriers.” (Id., p. 31.)

“The requests of the Commission for needful amendments have been supported by petitions, etc. \* \* \* yet not a line of the statute has been changed and none of the burdensome conditions which call for relief have been removed or modified.” (Annual Report for 1899, p. 5.)

“Until further legislation is provided the best efforts of regulation must be feeble and disappointing.” (Id., p. 5.)

“This (the power to make future rates) is the point to which the attention of the Congress has been repeatedly called; this is the defect in the regulating statute which demands correction. In previous reports this question has been frequently and fully discussed. We have commented at length upon the weakness and inadequacy of the law as its provisions have been construed by the courts.” (Annual Report for 1903, p. 12.)

“The popular demand may eventually take that form (the original rate-making power) under the stress of continual delay in remedying ascertained defects in the present plan of regulation.” (Annual Report for 1904, p. 8.)

It would be impossible to state in detail the efforts which, incidentally to this propaganda, have been made to stimulate public feeling. One or two instances must suffice. Thus the expression “transportation tax” (Annual Report for 1900, pp. 9, 13, 24; Annual Report for 1903, pp. 14, 15, 17) has been habitually applied to the charges of the carriers, apparently for the purpose of arousing the same sort of prejudice against the payment of such charges as is felt by many against the payment of taxes. The expression, of course, has no more accuracy than would such an expression as the “wheat tax,” or the “beef tax,” or the “corn tax,” or the “clothing tax,” or the “newspaper tax” have in describing what is currently paid for those articles of general use. The individual consumer has no more to do with fixing the prices thereof than with fixing the charges of the carriers. And those prices are far more of a universal burden than are transportation charges; for, as the Commission said in its annual report for 1900 (p. 9), “generally a slight increase in the rate does not materially affect the price to the consumer;” and, again, in its annual report for 1903, “so, too, with the great volume of traffic, the cost of transportation is not a sufficiently large factor in the total cost of the article to the consumer, so that a reduction of the freight rate would stimulate consumption to a sufficient degree to justify the reduction” (p. 16).

“Perhaps in most instances the freight rate is so small a part of the total cost of a commodity that the consumer is unconscious of the increase in rate.” (Id., p. 32.)

But the general body of the consumers creates the demand which settles the amount of the transportation charge quite as much as the price of the goods

transported. Indeed, the most potent cause of the downward course of rates in the past has been the commercial necessities of shippers and consumers and the efforts of traffic officials to meet them.

So, too, the Commission, in its annual report for 1903 (pp. 13-15), and one or more of its members in various published statements, have asserted with emphasis that rates as a whole have greatly increased. In an article recently published in the North American Review one of the Commissioners goes so far as to say: "Within the last five years rates upon every important commodity in every section have been advanced. \* \* \* We are confronted with increasing monopoly, with advancing freight rates, and with no probable relief in sight." Yet in 1898 the average freight rate per ton per mile was 0.753 cents or 7.53 mills, and in 1903 it was 0.763 cents or 7.63 mills (*infra*, p. 14). So that the increase upon which are founded these lugubrious views amounted, in a time of generally rising prices, to ten thousandths of a cent per mile, or 10 cents per ton for each thousand miles. Moreover, as will shortly be shown, almost no cases of unreasonable rates have ever been established before the Commission and none whatever in the courts, and the cost of materials between 1898 and 1903 rose out of all proportion to transportation charges.

Still further, on March 11, 1904, the Senate requested the Commission to report the principal changes in tariff rates since June 30, 1899, with "an estimate of the effect of such changes upon the gross and net revenues of the railway corporations during each fiscal year since then \* \* \* and also to report the changes in cost of operation and maintenance of the railways for said years." The Commission reported on April 7, 1904, that, comparing 1899 with 1903, there was, from this cause, an addition to the gross earnings amounting to \$155,475,502. It omitted to answer the request for information regarding the net revenues and cost of operation and maintenance on the ground "that the returns for the fiscal year 1903 have not yet been compiled, and the figures relating to the cost of operation and maintenance for that year must, therefore, be omitted, \* \* \*" but said that its "method of computation was not without value as indicating enormous additions in recent years to the cost of railway transportation to the people of the United States."

Yet the figures as to operating expenses were in possession of the Commission quite as much as those as to gross earnings; they were contained in the same official reports of the railway companies to the Commission. In the preliminary report of their statistician, dated December 12, 1903, and again in the regular annual report of the Commission for 1903, dated December 15, 1903, those figures had already been stated for 98 per cent of the mileage of the country at \$1,248,520,483, which was an increase of \$620 per mile over 1902. The advance in operating expenses from 1902 to 1903 is stated in the report of the statistician for 1903 (p. 85) to have been \$141,290,105 and in the report of the Commission for 1904 (p. 112) as \$141,193,494, and the increase in taxes and interest was \$13,262,391, making the total increase in expense of the business in that one year \$154,455,885. It will shortly be shown, too, that the Commission's figures indicated that from 1899 to 1903 the increase in both gross earnings and net revenue had not been as great relatively to the volume of business as the increase in expenses of operation. These facts the Commission did not mention, although the Senate resolution called for information on the precise subject of operating expenses and net revenue.

The Commission's annual report for 1900 (p. 9) stated that "generally a slight increase in the rate does not materially affect the price to the consumer," but that "since every such advance adds to the net revenues of the railway, a very slight increase in all rates, if it should be permanently maintained, would enhance enormously the value of railway securities."

The view of this report of March 11, 1904, apparently was that any such result would necessarily be a calamity. The results for 1904 show how completely increasing expenses have exhausted increased gross earnings of the railroads. Their gross earnings increased, over 1903, to the amount of \$65,188,714, but the net earnings decreased \$6,393,265, as compared with the previous year. Operating expenses increased \$250 per mile over 1903, and the operating ratio increased from 66.16 per cent to 67.75 per cent of gross earnings, or an increase of 1.59 per cent on the entire amount of gross earnings. (Annual Report for 1904, p. 106.)

It is much to be regretted that the action has been taken which is indicated by these illustrations. The shippers and the carriers stand in relations to each other very similar to those of merchants and their customers. The effort of all parties interested in the general welfare should be toward closer and more har-



monious relations between them. In investigating grievances presented to them and bringing the parties together, the Commission has done a great and beneficent work, and that has been and always will be by far its most important function. (Annual Report for 1893, p. 14; Annual Report for 1895, p. 48; Annual Report for 1897, pp. 32, 51.) In its Annual Report for 1904, pages 36, 73, it appears that 487 complaints were filed with the Commission, of which 425 were settled by correspondence with the carriers and only 62 were made the subject of contest, "the greater number of these complaints having been settled to the satisfaction of all concerned" (p. 73). It is unfortunate that the dignity and usefulness of the Commission in this regard have been, in a measure, compromised by grasping for powers to control the future such as are possessed by no branch of the Government, and probably could never be successfully exercised.

PROPOSITIONS TO INCREASE THE COMMISSION'S POWER, INCLUDING PENDING  
LEGISLATION.

The changes in the law which have been urged upon Congress have varied considerably from time to time. Shortly after the Supreme Court decisions above stated a bill was introduced substantially conferring general original rate-making power upon the Commission. When this failed a bill followed providing that the carriers should make the rates in the first instance and the same should thereafter be subject to general revision by the Commission, which would thus really have been the rate makers. On the failure of this, it is now proposed that when the Commission has decided that an existing rate offends against the statute it shall have power to establish a rate for the future, thus giving it complete control over all rates. This proposition is embodied in the bill now pending before Congress known as the Quarles-Cooper bill, from the names of the Senator and Representative by whom it was introduced.

The provisions of the pending bill are in brief as follows:

(1) Where the Commission has made an order declaring any rate, regulation, or practice to be unjustly discriminative or unreasonable, and declaring what rate, regulation, or practice would be just and reasonable, and requiring them to be substituted therefor, such order shall become operative and be observed by the parties at the expiration of thirty days, or in case of proceedings to review, at the expiration of sixty days; but such order may at any time be modified, suspended, or revoked by the Commission upon full hearing of all parties in interest.

(2) In case the rate substituted by the Commission is a joint rate, and the carriers fail to agree as to division thereof, the Commission may make the division; moreover, the Commission may establish "the just relation of rates" to or from common points on the lines of the carriers and prescribe the rates to be charged by either or all of the parties to or from such common points when the carriers fail to agree.

(3) Every such order as to its justness, reasonableness, and lawfulness shall be reviewable by the circuit courts on petition filed within twenty days. Thereupon the record before the Commission shall be certified to the court. The court shall proceed to hear the case on this record; or, in its discretion, may, in such manner as it shall direct, cause additional testimony to be taken. If, after hearing, the court shall be of opinion that the order was made under some error of law or is, upon the facts, unjust or unreasonable, it shall modify, set aside, or annul the same by appropriate decree; otherwise the petition shall be dismissed. Pending the review the court may, if in its opinion the order is clearly unlawful or erroneous, suspend the same. Within thirty days after rendition of any final decree of the circuit court, any party may appeal to the Supreme Court, but there shall be no stay on appeal.

(4) The defense of all such cases shall be carried on by the United States attorney, under the direction of the Attorney-General, and the Commission may with his consent employ special counsel. If any party bound thereby shall neglect to obey or perform any order of the Commission, obedience thereto shall be summarily enforced by writ of injunction or other proper process, mandatory or otherwise, which shall be issued by any circuit court upon petition of the Commission or any party interested, accompanied by a certified copy of the order and evidence of the violation, and in addition the offending party shall be subject to a penalty of \$5,000 per day recoverable by the Commission in an action of debt for the use of the United States.

These provisions are certainly both novel and drastic. The burden is very strongly upon those who urge such methods of dealing with the greatest indus-

trial interest of the country to establish that (1) they are required by present conditions; (2) they are judicious as a future system; (3) they are warranted by the Constitution of the United States, and (4) they would be likely to accomplish the desired results. But the affirmative can be established as to not a single one of these propositions.

(1) THERE IS NOTHING IN PRESENT CONDITIONS WARRANTING THESE DRASTIC INNOVATIONS.

The substantive provisions of the act are that (a) rates shall be reasonable and (b) rates shall not discriminate unjustly and there shall be no undue or unreasonable preference between persons or localities or classes of traffic. (162 U. S., 197.) The former provision concerns the public generally and the latter the persons or localities directly affected. (43 Fed. Rep., 48.)

(a) *The existing rates are reasonable in themselves.*—The past course of freight rates throughout the country has shown that there is no ground for complaint in this respect. It has been as follows, according to official figures, using those of the Interstate Commerce Commission since it was established. It should be borne in mind that these figures include local as well as interstate business, and that if the two were separated the interstate rates would be considerably less.

| The average rate per ton per mile was, in— | Cents. |
|--|--------|
| 1870                                       | 1.990  |
| 1882                                       | 1.240  |
| 1887                                       | 1.030  |
| 1888                                       | 1.001  |
| 1889                                       | .922   |
| 1890                                       | .941   |
| 1891                                       | .895   |
| 1892                                       | .898   |
| 1893                                       | .879   |
| 1894                                       | .860   |
| 1895                                       | .839   |
| 1896                                       | .806   |
| 1897                                       | .798   |
| 1898                                       | .753   |
| 1899                                       | .724   |
| 1900                                       | .729   |
| 1901                                       | .750   |
| 1902                                       | .757   |
| 1903                                       | .763   |

Thus the average in 1870 was more than two and one-half times that in 1903. The freight earnings for 1903 were \$1,338,020,026. (Annual Report for 1904, p. 111.) On the basis of 1870 they would have been approximately \$3,408,497,432. Upon the basis of 1870 the gross freight earnings would, therefore, have been greater by \$2,070,790,646 than they in fact were in 1903. When the Interstate Commerce Commission was established, in 1887, the rate was 1.03, and in 1903 it was 0.763—a difference of nearly 26 per cent. If the rates of 1887 had applied to the traffic of 1903 the earnings would have been about \$468,109,714 greater than they were in fact. Ten years ago, in 1893, the rate was 0.878, and in 1893 it was 0.763—a difference of 13 per cent. If the rates of 1893 had been applied to the traffic of 1903 the earnings would therefore, have been about \$201,620,288 greater than they were in fact.

Upon the general course of rates the following remarks of the Commission are pertinent: "Where changes of any importance have taken place in the freight rates of any section, either for local or competitive traffic, in nearly all cases lower rates are now charged than prior to the date of the act to regulate commerce." (Annual Report for 1894, p. 50.)

"Only from an extended inquiry would it be possible to accurately estimate the total reduction effected since the passage of the act to regulate commerce, but that it has been very considerable is well known. \* \* \* Comparing the amounts received by the railways for transportation with amounts which they would have received on the volume of traffic carried from 1889 to 1893, if the average receipts per mile for 1888 had been maintained during the subsequent five years, it appears that the public would in such case have paid for freight and passenger transportation by railroad from 1889 to 1893, inclusive,

\$525,459,587 more than was actually paid for such transportation during that period." (Id., p. 51.)

The foregoing figures as to the rates for each year show that the downward course of rates has continued since these remarks were made.

As already said, some comment has been made upon the fact that between 1899, the lowest point ever reached, and 1903, in a time of generally rising prices, the mileage rate increased thirty-nine hundredths of a mill, or thirty-nine thousandths of a cent. In reply to a resolution of inquiry from the Senate the Commission reported in March, 1904 (Senate Doc. No. 257), that, comparing 1899 with 1903, this increased gross earnings, in the amount of \$155,475,502, but professed its inability to say how much it had added to net earnings. Yet the Commission's final report for the year ending June 30, 1903, proved that this had not increased net earnings at all relatively to the volume of traffic. The operating expenses established thereby showed that, comparing 1899 with 1903, gross earnings per mile increased 31.1 per cent, while operating expenses increased 34 per cent; that the operating ratio of expenses to earnings increased from 65.24 per cent to 66.16 per cent; that the number of employees increased from 928,924 to 1,312,537, namely, 383,613, or 41.3 per cent, and their compensation from \$522,967,896 to \$775,321,415, namely, \$252,353,579, or 48.2 per cent. From 1902 to 1903, alone, operating expenses, taxes, and interest increased \$154,455,885. (Annual Report for 1904, p. 112.) The figures for 1904 show that, comparing with the previous year, gross earnings increased \$65,186,714, but net earnings decreased \$6,393,265; that operating expenses increased \$250 per mile; that the operating ratio rose from 66.16 per cent to 67.75 per cent, or 1.59 per cent of the entire gross earnings, and that the operating ratio was 2.21 per cent of the entire gross earnings above the operating ratio of 1899. (Annual Report for 1904, p. 106.) These figures show that the slight increase in rates from 1899 to 1903 has been totally absorbed by the increase in expenses of operation.

It is interesting, in this connection, to notice a comparison made by the Commission between the business of 1897 and that of 1902, as follows:

"As the rates, broadly speaking, were about the same in both years, it follows that the large increase in earnings resulted mainly from the increased volume of traffic." (Annual Report for 1902, p. 5.)

The mileage rate in 1897 was 0.798 cent and in 1902 was 0.757 cent. The difference was, therefore, 0.041 cent, and the Commission described the rates as "about the same." But in 1899 the mileage rate was 0.724 cent and in 1903 the rate was 0.763 cent. The difference, therefore, was 0.039 cent, or precisely 0.002 cent—two one-thousandths of a cent less than that when the Commission had described the rates as "about the same." Yet the Commission spoke of the latter difference as establishing "enormous additions in recent years to the cost of railway transportation." (Senate Doc. No. 257.) When the difference in rates was 0.041 cent they were described as "about the same;" a slightly smaller difference amounting to 0.039 cent can not, therefore, be consistently described as having made "enormous additions to the cost of transportation."

Again, the average rate in 1897 was 0.798; in 1899, by reason of unfavorable commercial conditions, but especially of excessively low rates on bituminous coal, the average rate declined to 0.724; in 1903 it rose to 0.763—not as high as it had been six years previously, and an increase of 0.039 cent. This fluctuation clearly came within the expression of the Commission that "when reductions have been made on account of commercial depression, it is difficult to see why corresponding advances may not properly be made with the return of business prosperity." (Annual Report for 1903, p. 48.)

Indeed, there has been no such rise in railway rates as has occurred in the case of commodities generally. The recently published bulletin of the Department of Labor (No. 51), with reference to the general course of prices, shows that, taking 100 as the average for the period from 1890 to 1899, the price of all commodities in 1902 stood at 112.9, or 12.9 per cent above the average of the preceding decade. Applying the same treatment to railway rates, they stood in 1902 at 90.2, or 9.8 per cent below the average of the preceding decade. This shows that railway rates had greatly declined, while prices in general had greatly advanced.<sup>a</sup>

The rates are about one-third the average in England and France, and about

<sup>a</sup> This has been conclusively demonstrated in pamphlets recently published by Mr. H. T. Newcomb, of Washington, and Mr. Slason Thompson, of Chicago.

one-half the average in Germany. A slight effort has been made to discredit the mileage basis as a proper test; the claim made in that connection is that the average has been affected by a disproportionate increase of low-grade freight. The suggestion that in a country constantly developing industrially, raw materials increase disproportionately to finished products is manifestly without merit. Accordingly, the facts are to the contrary. In 1890 the percentage of low-grade freight was 76.81 of the whole; but in 1902 it decreased to 75.87, and the higher-class commodities correspondingly increased. The mileage basis is generally accepted as the only practicable standard for measuring general conditions. "The rate per ton per mile rule brings rates down to the narrowest point of scrutiny, and for that purpose is valuable," although not absolutely controlling upon individual cases where circumstances are exceptional. (Annual Report for 1890, p. 37.) It may be added that the reductions in rates have been approximately similar in the different parts of the country.

Very few substantial controversies have ever arisen regarding the reasonableness of rates, and the Commission has frequently stated, in substance, that there is no ground therefor. It has from time to time discussed in its reports "unreasonably low rates." (Annual Report for 1893, pp. 38, 39, 220, 221; Annual Report for 1894, p. 60; Annual Report for 1897, pp. 24, 25.) In its annual report for 1893 the Commission stated that "to-day extortionate charges are seldom the subject of complaint (p. 12). \* \* \* We are not troubled with the question (under consideration in England) that rates \* \* \* are too high. (Id., p. 17.) It is significant that during the period of commercial development and railroad extension, which have brought communities into such close business relations and made slight differences in transportation rates on competitive commodities a matter of serious import, there has been, under the operation of the interstate-commerce law, a steady decrease of complaints based on charges unreasonable in themselves. The concession is quite general among shippers that, with some exceptions, rates as a whole are low enough, and they often express surprise that the service can be rendered at prices charged. (Id., pp. 218, 219.) Traffic for very many competing localities is being carried at rates which do not yield a due proportion of the necessary net revenue which carriers must have." (Id., p. 221.)

In its annual report for 1897 the Commission said (p. 14):

"Rates to competing and distributing centers are not for the most part unreasonably high. They are frequently quite low. \* \* \* Many rates in this country are undoubtedly too low." (Id., p. 2.)

These facts are of general application, because nearly every city in the country of any "considerable size is both a commercial and a railroad center, therefore a competitive point in both respects." (Annual Report for 1896, p. 39.) In its annual report for 1898 (p. 27) the Commission said: "It is true, as often asserted, that comparatively few of our railway rates are unreasonable in and of themselves—that is, without any reference to other charges made by the same carrier or to those of other carriers"—but they may operate to create a preference between localities. \* \* \* "The cases are exceedingly rare in which unreasonableness has been found merely from the amount of the rate itself as laid upon the particular traffic and the distance it was carried". (p. 27).

On March 18, 1898, the chairman of the Commission testified before the Senate Committee on Interstate Commerce that the question of excessive railroad charges—"that is to say, railroad charges which in and of themselves are extortionate—is pretty much an obsolete question." At that time the rate per ton per mile was within one one-hundredth of a cent of that in 1903, when the chairman described the rates as having made "enormous additions to the cost of railway transportation." The foregoing table of rates in each year shows that since these numerous statements were made the rates have been and now are much lower.

Accordingly, litigated cases in which rates have been shown to be unreasonable in themselves are practically unknown. In reply to a resolution of inquiry passed by the Senate on April 16, 1900, the Commission reported (Senate Document No. 319, 56th Cong., 1st sess.) regarding contested cases which had been before it during ten years prior to that date. It appeared from this report that during that time it had found very few cases of unreasonable rates. As the chairman said, that question had become "obsolete." In 1900 and 1901 there were but three cases of unreasonable rates sustained by the Commission. An independent examination shows that from 1887 until the present time the Commission has found 26 cases of rates unreasonable in themselves, or about one and one-half annually. Further than this, not one of these decisions was

sustained by the courts, and there has not been a single case of rates unreasonable in themselves established in the courts since the Interstate Commerce act was passed.

The record, therefore, proves clearly that the provision of the act that rates shall be reasonable in themselves has been fully observed. The remedies provided by the act have shown no insufficiency. There are no facts establishing the necessity of further power for this purpose in the Commission. The Commission itself suggests no such facts. Even as to the advances claimed to have been made since 1899, amounting to thirty-nine thousandths of a cent per ton per mile, it does not show that they have been unwarranted or excessive. In its annual report for 1899 it said: "It is not intended to intimate that these advanced rates are unlawful," but "the injustice which may result must be without available redress" (p. 8). In its report for 1903 the Commission said: "It would be both unwise and unjust upon the part of the public to prevent them, if they are reasonable under all the circumstance (p. 15). \* \* \* If they are just and reasonable, they ought not to be prevented" (p. 17). So, too, in a recent article in the *North American Review*, to which reference has been made, one of the Commissioners said: "I do not charge that any part of this is unjust, but that some way should be devised by which the reasonableness of these charges should be passed upon by the Government."

The claim is, therefore, not that any injustice has been done in respect to reasonableness of rates—there is no one asserting that he has been damaged and the Commission does not assert the existence of any injustice and has never taken action against the rates thus criticised—but merely and baldly that rates generally should be fixed by the Government. (Annual Report for 1898, pp. 20, 24; Annual Report for 1900, p. 21.) That claim is put forward without support of anything save the opinion of the Commission. As no injustice is shown arising from the present method, such expressions of opinion can not be deemed to warrant such a fundamental change.

(b) *The lawmaking power has dealt fully with preferences between individuals.*—Preferences between individuals have been alleged to arise principally if not wholly from secret rebates. There has been much resounding talk upon this subject, yet here, too, the record both of the Commission and the courts embraces few adjudicated cases, when the extent of the railway traffic of the country is considered, and nothing further upon this subject can be accomplished by statutory enactment. "The power of the statute in this direction was practically exhausted in creating the offense. When that was done, when certain acts were declared misdemeanors, the subsequent perpetrators of those acts became at once liable to criminal prosecution in like manner and by the same agencies as other offenders. Nor can Congress provide any summary or exceptional methods for preventing or punishing this class of transgressions. \* \* \* Theoretically, at least, the existing system of laws applicable to the wrongdoing now referred to is complete and ample. It is not lacking in strength or certainty." (Annual Report for 1893, p. 7.)

"No amendment of this statute, therefore, is necessary or suitable with the view of giving greater power to the Commission in enforcing its penal provisions." (Id., p. 8.)

In addition to this if secret rebates existed, rates made by the Commission would be as much subject thereto as any others; so that conferring rate-making power upon the Commission would not be an appropriate or effective remedy.

However, in 1903 the Elkins Act was passed without opposition by any interest, under which the Commission has power to obtain injunctions from the courts prohibiting secret rebates or rate cutting. This was a step in the right direction, as it provided for direct application by the Commission to the courts to enforce the act. It is conceded that the Elkins Act has been generally effective. In its annual report for 1903 (pp. 10, 11), the Commission said:

"No one familiar with railway conditions can expect that rate cutting and other secret devices will immediately and wholly disappear, but there is basis for a confident belief that such offenses are no longer characteristic of railway operations. That they have greatly diminished is beyond doubt, and their recurrence to the extent formerly known is altogether unlikely. Indeed it is believed that never before in the railroad history of this country have tariff rates been so well or so generally observed as at the present time. \* \* \* In its present form the law appears to be about all that can be provided against rate cutting in the way of prohibitive and punitive legislation; unless further experience discloses defects not now perceived, we do not anticipate the need of further amendments of the same character and designed to accomplish the same purpose."

In its annual report for 1904 (p. 6), the Commission has just said:

"As to that branch of regulation which deals with the publication and invariable application of tariffs, the act as amended by the Elkins law of February 19, 1903, appears to be operating successfully as applied to carriers subject to its provisions."

So, too, one of the Commissioners in the article in the *North American Review*, to which reference has been made above, has said that "the effect of the Elkins bill and the injunction proceedings has been to secure the maintenance of rates: that condition will probably continue."

Secret rebates and preferences to individuals have, therefore, been fully dealt with, so far as concerns the lawmaking power. If they reappear, it can be due only to failure by the executive branch of the Government to enforce the existing statutes.

(c) *The matter of alleged preferences between localities and classes of traffic is much exaggerated; such claims will always exist, and the present statute furnishes ample means of dealing with them.*—Nothing covered by the substantive provisions of the interstate-commerce act remains to be considered save the matter of alleged unjust or unreasonable discriminations or preferences between localities and classes of traffic. This is the matter with which the contested cases before the Commission are principally concerned. It is important to remember that, in the language of the Supreme Court:

"It is not all discriminations or preferences that fall within the inhibition of the statute: only such as are unjust and unreasonable. (145 U. S., 284.) Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress; the very terms of the statute that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, or corporation, or locality must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act. (162 U. S., 218.) The mere circumstance that there is, in a given case, a preference or an advantage, does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act." (162 U. S., 220.)

Claims that preferences exist and that they are unreasonable arise from the spirit of business rivalry, which is always natural, and from the general desire to secure equal advantages with others. Indeed, it may be said of the shippers, with very rare exceptions, that they do not deem the rates too high, and do not wish to force them unreasonably low, but wish merely to secure equality of treatment.

"Shippers mainly agree that unstable rates are injurious to business industries and to commerce generally. They claim that reasonable rates that are stable are better than sporadic low rates that are below what is just and reasonable." (Annual Report for 1893, p. 39.)

"The rate is of very little consequence to the merchant, provided it is the same to his competitors as to himself." (Annual Report for 1897, p. 18.)

As the New York Board of Trade and Transportation said in its recent report upon the subject:

"If the carriers are held rigidly to their tariff rates, it matters not much what those tariffs are if all shippers are charged and required to pay alike, and excessive tariff rates are no longer to be accounted with to the same extent as formerly."

The efforts of traffic officials to meet the necessities of shippers and consumers in these regards have had more to do than any other cause with the reduction of rates and their proper adjustment as between different localities. That will continue to be the case.

"In view of their opportunities and the temptations to which their traffic officers are exposed, it is perhaps not too much to say that the obligations of neutrality in this regard are usually observed, and that discriminations of this character are not often the subject of complaint." (Annual Report for 1895, p. 17.) "The carriers are better qualified to adjust such matters than any court or board of public administration and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar

circumstances and conditions to their business." (Circuit court of appeals, cited in Annual Report for 1896, p. 32; also, 5 I. C. R., 697.)

"It is worth observing that some, at least, of the most important controversies involving the rates and methods of railway carriers are rather between competing communities or producing regions than between rival lines of railway. Railway development has extended far beyond the point at which any of the greater systems finds its interests so identified with a single community as to feel wholly indifferent to the demands and needs of all competing communities. Indeed, there may be entire sincerity in the contention on the part of the officers of a great system that any adjustment which satisfies the rival communities which it serves can not be seriously objectionable from its own point of view. In such degree as this contention may be sincerely advanced the carrier becomes a relatively unimportant factor in the struggles of rival localities." (Annual Report for 1904, pp. 28, 29.)

But if these struggles are permitted to constantly pare down the carrier's revenue, they are a most important factor in the success of the carrier's business.

This demand for absolute equality among localities can never be entirely satisfied. If under any conceivable form of statute the Commission could accomplish this it would still be very questionable whether that result would be altogether desirable, as it would tend to destroy the active spirit of enterprise which is necessary to commercial success.

"It is idle to look forward to an adjustment of rates which, as applied to localities and differently circumstanced persons, will bear no heavier upon one than upon another. Such mathematical equality is manifestly unattainable through human endeavor. Not even common control of all railways through consolidated ownership or Government purchase could accomplish such a task of equalization for thousands of places and millions of persons. Certainly the much-vaunted theory of uniform charges for all traffic would, under the greatly diversified conditions which now prevail throughout the country, have the opposite effect and inflict greater discriminations than arise under the existing general practice of fixing charges which attract traffic to the various lines. Uniform rate per mile on all traffic for any distance would arbitrarily limit commerce to sections and greatly restrict production." (Annual Report for 1893, p. 218.)

"Trade is no longer limited to circumscribed areas; distance hardly ever bars the making of commercial bargains between widely separated parties, and almost every article of commerce finds the competing product of another region in any place of sale. The consequence is that products of the farm, the forest, the mill, and the mine are continually demanding from carriers rates adjusted to values in particular markets. It is this competition of product with like product, of market with market, that has induced carriers, in their eagerness to increase the values of their traffic, to continually reduce their rates to market points. Such competition is the competition of commerce itself; the strife between competing industries which the public interest demands should be left free from fettering laws and uncontrolled by restraining combinations." (Id., p. 219.)

As an illustration may be quoted what the Commission has said regarding rates upon flour:

"To an extent the rate upon flour to the foreign market must be higher than that upon wheat. This is decreed by physical conditions which no statute and no commission can alter." (Annual Report for 1901, p. 16.)

Moreover, in States where railroad commissions have power over future rates, questions of alleged discriminations between localities and classes of traffic are as frequent and acute as ever.

Like all commercial questions, these matters are best settled between the parties. The foregoing expressions show that the carriers, in general, use their best efforts to adjust them properly. And the past record proves that the remedies provided by the Interstate-commerce act have not been insufficient to enforce its provisions in this regard. The Commission's report to the Senate of 1900 (Senate Doc. No. 319), to which reference is made above, showed that during the preceding ten years it had sustained only 31 cases of discrimination between localities or classes of traffic, and of these only 4 were sustained by the courts, which was about one for every two and one-half years, and 3 of these were subsequently reversed. Indeed, it will shortly be shown that since the passage of the act contested cases of all sorts have been comparatively few

in number, and that, with two exceptions, the Commission has been reversed in all of its decisions as to rates which have been passed upon by the courts.

It is very evident, therefore, that the changes in the statute now urged are not required by present conditions and would not remedy anything objectionable therein. Considering that the subject-matter is so vast, the provisions of the act have been very closely observed.

(2) THE CHANGE PROPOSED IS NOT DESIRABLE AS A FUTURE SYSTEM.

Nothing can be gained by comparing this country with others. In many other countries the railroads are largely owned by the government, and the principal object of controlling rates is to prevent the private roads from making lower rates than the government roads; the matter is really a branch of the system of taxation. The result is that the rates are much higher than here and; still further, pooling is recognized as lawful, and in some jurisdictions compulsory, so that the roads participate proportionally in these high rates. Even in England, where the roads are privately owned, the rates are about three times as high as they are here. In addition, half the railroad mileage of the world is in this country, so that there is little profit in considering methods applying throughout the world to the other half of such mileage, under conditions and systems of government varying almost totally from those prevailing here. So, too, there is nothing in the illustration often employed of the supervision exercised by this country over its national banks. (Annual Report for 1895, p. 62.) That supervision is entirely in the interest of the stockholders and depositors and not for the purpose of limiting or in any way controlling the charges or earnings of the banks. The system now proposed is anomalous, and must be judged upon its own merits.

The views of the Commission in reference to the operation of such a system are expressed to some extent in its annual reports.

"To give each community the rightful benefits of location, to keep different commodities on an equal footing, so that each shall circulate freely and in natural volume, and to prescribe schedule rates which shall be reasonable, just to both shipper and carrier, is a task of vast magnitude and importance. In the performance of that task lies the great and permanent work of public regulation." (Annual Report for 1893, p. 100.)

"No one who understands the intricacies of transportation would care to assert that the determination of a just rate, or the decision as to what constitutes discrimination, is an easy task. To some extent the principles upon which taxation rests must be allowed in fixing a just rate; to some extent the result of the rate upon the development of industries must be taken into the account in all decisions which the Commission is called upon to make; to some extent every question of transportation involves moral and social considerations, so that a just rate can not be determined independently of the theory of social progress." (Annual Report for 1895, p. 59.)

The considerations, it will be noticed, do not seem to include reasonable compensation to the owners of the railroads. "Within certain limits it is good policy for the railway manager to increase his tonnage, even at the expense of reducing the rate per ton. Just how far this rule applies no one can tell. The merchant who buys an article for a definite price knows when he sells it whether he makes or loses by the transaction; and the manufacturer, as a rule, has a pretty accurate idea of the cost of production, but the railroad operator can not ordinarily say whether he should or should not as a matter of policy take traffic at a certain price." (Id., p. 17.)

"The freight rate is a complex problem when applied to almost all competitive traffic. Very few people not acquainted with the subject have any idea how difficult the solution of that problem is." (Annual Report for 1898, p. 15.)

"It is often difficult to say what constitutes a reasonable rate and more difficult to give in detail the reasons that lead to the conclusion reached; although the Supreme Court of the United States has given certain rules by which to test the reasonableness of transportation charges, and although the Commission has endeavored to apply those rules, yet whenever it has interrogated railway officials as to whether or not they are governed by them when making rates of transportation, they have invariably answered in the negative and said that to do so would be impracticable. The carriers do not apparently possess the necessary data for that purpose, and there is at present no other source from which the Commission can obtain such data." (Annual Report for 1903, p. 54.)

"Discriminations between localities or classes of traffic can be redressed only



by the exercise of sufficient authority to readjust rate schedules to be observed in the future on the basis of relative justice." (Annual Report for 1904, p. 9.)

"The great bulk of our orders \* \* \* must pertain to the future. They will be orders fixing either a maximum or a minimum rate." (Annual Report for 1897, p. 35.)

"It is probably near the truth to say that the cases now pending before the Commission directly or indirectly affect almost every locality and therefore nearly all of the people of the United States." (Annual Report for 1904, p. 29.)

In connection with this vast programme of regulation of the affairs of the country generally, it seems proper to mention that during the past year it has been necessary to conduct an official examination of the office of the Commission itself.

Early in the history of the Commission Judge Cooley, its most eminent member, said, regarding a suggestion which would require the Commission to "act as rate makers for all the roads," that "this in any considerable State would be an enormous task. In a country so large as ours and with so vast a mileage of roads it would be superhuman." (1 I. C. R., 280.) This superhuman programme regarding the future powers of the Commission is not consistent with sound views of the functions of our Government. The Constitution would prevent a considerable part of it by the provision (Art. I, sec. 9) that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over another." So, too, President Jefferson in his first message (December 8, 1801) said: "Agriculture, manufactures, commerce, and navigation, the four pillars of our prosperity, are most thriving when left most free to individual enterprise." Again, one hundred years afterwards, President Roosevelt, in his first message (December 3, 1901) said: "It must not be forgotten that our railways are the arteries through which the commercial life blood of this nation flows. Nothing could be more foolish than the enactment of legislation which would unnecessarily interfere with the development and operation of these commercial agencies."

In deciding whether it is desirable to give the Commission power such as this it is well to consider the record of the past. In its report of April 16, 1900 (Senate Doc. No. 319), to which reference has been made, the Commission stated the entire number of contested cases decided in the previous ten years as 180, or about 18 per annum. Of these, only 35 went to the courts, or about 3½ per annum. The result was that the Commission was sustained in 4 cases (2 of which were subsequently reversed), reversed in 17 cases, 12 were still pending, and 2 were withdrawn; that is to say, about 1 case in every two and one-half years was sustained by the courts, and slightly more than 80 per cent of the Commission's decisions which had been passed upon were reversed. This the Commission seeks to explain by the fact that it had misconstrued the extent of its powers. (Senate Doc. No. 319.) But there could be no more fundamental or regrettable error than for any tribunal to constantly exceed its jurisdiction. In point of fact, too, the results seem to have been about the same since 1897, when the Supreme Court authoritatively ruled as to the jurisdiction of the Commission as they were before that time.<sup>a</sup>

An independent examination of the records which has just been made makes a showing even less favorable. From its creation, in 1887, until October, 1904, the Commission rendered 297 formal decisions involving rates or discriminations, covering 353 cases, as in some instances cases were heard together. This was a period of seventeen years, and the decisions, therefore, averaged about 17½ per annum. Action favorable to the complainants was taken in 194, or 54.96 per cent of the cases decided. So that the complaints coming before it which the Commission held to be well founded averaged 11½ per annum. In the great majority of cases the carriers complied with the Commission's decision. Since 1887 43 suits have, however, been instituted to enforce final orders of the Commission as to rates. This is an average of about 2½ per annum. The net result of the action of the courts has been that in 1 of these cases the Commission was sustained in part by the Supreme Court, and in 1 was sustained by the circuit court, and there was no appeal. These were both cases of discrimination between localities. In 30 cases the Commission was reversed. Two cases were withdrawn; 5 have been long pending, but have not been pressed for hearing, and 4 are still pending. This

<sup>a</sup> The facts as to this matter have been worked out with much clearness and detail in several pamphlets published by Mr. Joseph Nimmo, jr., of Washington. They seem never to have been questioned.

shows 2 affirmances and 30 reversals. In other words, about 93 per cent of the decisions of the Commission which were passed upon by the courts were held to have been erroneously decided.

The pending act proposes that the orders of the Commission shall be operative until they are set aside by the courts—they are to have the force of statutes. The Commission describes itself as "the special tribunal created by Congress and exercising its power." (Annual Report for 1895, p. 17.)

"If the Commission establishes a rate that is tantamount to an act of the legislature." (Annual Report for 1897, p. 37.)

As one of the Commissioners expressed the matter at a hearing before the Senate Committee on Interstate Commerce on February 21, 1900 (p. 118):

"The prescribing of a rate is, under the decisions of the Supreme Court, a legislative, not a judicial, function, and for that reason the courts could not, even if Congress so elect, be invested with that authority."

The importance and effect of the Commission's action are stated as follows:

"One of the peculiar features of Federal regulation is that every case before the Commission, however trivial it may appear, involves in its disposition the formulation of principles under the law which have important bearing upon the business of carriers and the commerce not only of the immediate locality, but often of the entire country." (Annual Report for 1893, p. 13.)

But, as just said, over 90 per cent of such decisions have ultimately been overruled. So far as experience is a guide, such a provision as that now proposed would, therefore, probably accomplish injustice in over 90 per cent of the cases affected until the courts granted relief. For this injustice there would be no remedy, because no recovery could be had from the shippers whose goods had been carried upon unjustly low rates. Still further, in case of an appeal to the Supreme Court, the statute expressly provides that there shall be no stay under any circumstances. After long litigation, therefore, the carrier would, in over 90 per cent of the cases, succeed in setting aside the order of the Commission, and would have no remedy whatever for the wrong accomplished by that order.

The substantial and valuable work of the Commission in behalf of the principles laid down by the statute has been in the way of aiding adjustment between the parties. (Annual Report for 1893, p. 14; Annual Report for 1896, p. 55; Annual Report for 1897, pp. 32, 51.) In its annual report for 1901 it says (p. 19):

"The great mass of complaints are handled and disposed of by the Commission by preliminary investigation and correspondence or conference with carriers and shippers."

"It may be true that the people who complain of excessive rates are more unreasonable in the making of this complaint than the carriers are in the making of their rates. That possibly is so. But it arises from the lack in these people of a knowledge of the actual situation." (Annual Report for 1897, p. 22.)

The total number of complaints during the year 1903 was 546, but only 84 formal proceedings were instituted before the Commission (Annual Report for 1903, p. 38) and only 16 cases were decided by the Commission, or in the proportion of 1 decision to 46 complaints (id., pp. 46-65, 276, 282). In 1904 there were 487 complaints, but only 62 formal proceedings (Annual Report for 1904, pp. 36-39), and 25 decisions were rendered, several of which were in the nature of rehearings (id., pp. 42-46). Since it was created over 90 per cent of the complaints filed with the Commission seem to have been disposed of informally. The only question at present is how the remainder shall be passed upon. It has been already pointed out that past experience does not warrant or require any enlargement of the Commission's powers in that respect.

Nevertheless the present bill seeks to provide that whenever a rate has been held to be unlawful the Commission may prescribe a rate which shall prevail thereafter. It is sometimes said that the original rate-making power is not sought. (Annual Report for 1895, p. 18; Annual Report for 1897, p. 15.)

"No such power has been asked by or is seriously sought to be conferred upon the Commission." (Annual Report for 1904, p. 8.)

The President's recent annual message said:

"I am of the opinion that at present it would be undesirable if it were not impracticable finally to endow the Commission with general authority to fix railroad rates."

Yet it is obvious that the provisions of the bill would have the effect of giving the Commission complete power over all rates; for, after all, the real rate-mak-

ing power lies with those who pass upon the rates finally, rather than with those who propose them in the first instance. The Commission itself, or any person whomsoever, whether or not he have any interest in the subject-matter and whatever his motive, whether he be a genuine shipper, a public official, a crank, or a blackmailer, may institute a proceeding which may include an unlimited number of carriers and attack innumerable rates. (194 U. S., 25.) Upon the institution of such a proceeding the Commission would be bound to proceed and would have complete power in the premises. This would make all rates subject to its decision.

This point does not admit of argument, because it has already been adjudicated. In its annual report for 1904 the Commission says (p. 8):

"The amendments now recommended by the Commission as to authority to prescribe the reasonable rate upon complaint and after hearing would confer in substance the same power that was actually exercised by the Commission from the date of its organization up to May, 1897, when the Supreme Court held that such power was not expressed in the statute."

The precise effect of this power was clearly stated by the Supreme Court as follows:

"There is nothing in the act requiring the Commission to proceed singly against each railroad company for each supposed or alleged violation of the act. In this very case the order of the Commission was directed against a score or more of companies and determined the maximum rates on half a dozen classes of freight from Cincinnati and Chicago, respectively, to several named southern points and the territory contiguous thereto, so that if the power exists, as is claimed, there would be no escape from the conclusion that it would be within the discretion of the Commission of its own motion to suggest that the interstate rates on all the roads of the country were unjust and unreasonable, notify the several roads of such opinion, direct a hearing, and upon such hearing make one general order reaching to every road and covering every rate."

Illustrations of the truth of this are that the Import Rate case, decided in 1894 (2 I. C. R., 658; 3 Id., 417), involved the rates upon all shipments from abroad to any interior points throughout the country; and the Supreme Court said that the orders therein—

"Instead of being regulations calculated to promote commerce and enforce the express provisions of the act, are themselves laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change laws and customs of transportation in the promotion of what is supposed to be public policy." (162 U. S., 234.)

The Maximum Rate case (4 I. C. R., 592, 617), decided in 1894, involved in one proceeding practically all rates on south-bound business east of the Mississippi River, and the Business Men's League case (9 I. C. R., 318), decided in 1902, involved substantially all rates from the Mississippi to the Pacific Ocean. As the Commission said, in language which has been already quoted from the annual report for 1893 (p. 13):

"Every case before the Commission, however trivial it may appear, involves in its disposition the formulation of principles under the law which have important bearing upon the business and the commerce not only of the immediate locality, but often of the entire country."

The extent of this power may be judged from the fact that the report of the Commission for 1904 (p. 64) states that there were then 2,358,960 tariffs on file, the annual average being over 130,000, and more than one-third of the Commission's clerical force—which third would apparently be about thirty clerks (Annual Report for 1903, pp. 128-131)—was constantly occupied in the work of filing, indexing, and furnishing information in reference to them (Id., p. 65), and from the facts that the gross earnings of the railroads last year were \$1,966,633,821 (Annual Report for 1904, p. 105) and the capitalization \$12,599,990,258 (Annual Report for 1904, p. 109), which is dependent for its value wholly upon earning power, and that the internal commerce of the country during the last year has been recently estimated at \$22,000,000,000 in value.

As the Commission said in its annual report for 1897:

"The amounts involved in the reductions asked for are enormous (p. 22); \* \* \* the amount of money involved would be much greater than that involved in the decisions of any trial court in the United States. The results would naturally be of more consequence to the litigants than those of any such court" (p. 26).

It might well have said than all the courts together. It should, therefore,

be plainly understood that the proposed act places all rates under the full and discretionary control of the Commission.

In the execution of this power it will shortly be seen that the Supreme Court has stated certain rules as following from the guaranty of property contained in the Constitution. It has already been seen that the Commission has stated its inability to apply the same (Annual Report for 1903, p. 54), and has admitted practically that it has no definite principles of rate making, but is controlled among other things by "moral and social considerations" in determining these vast rights of property. (Annual Report for 1895, p. 59.) This condition of things is not surprising. Every varied and complicated business must be treated as a whole. It is impossible to dissect it and treat its numerous parts separately in accordance with abstract rules. If the future of the business is to be subject to the control of those who have no interest therein, it would be better that such action should affect the business as a whole than that its income should be cut down by piecemeal without responsibility for the final result. Nothing, therefore, could be more dangerous to the value of railroad property than the system now proposed of committing its future to the control of persons without interest therein, or responsibility for the results of its operation.

Furthermore, the act contemplates conferring upon the Commission entirely new powers. It is now empowered merely to prevent preferences upon lines formed by a single railroad or by agreement of two or more for joint rates (secs. 1, 3).

"There is one class of discriminations which we have never possessed the power to effectually correct, even while we assumed the right to fix the maximum rate. We refer to that class of cases where the differential in question is to be maintained by independent lines as well as by a common line." (Annual Report for 1897, p. 24.)

"The Commission is not empowered to fix a minimum rate when that remedy is found necessary to correct wrongful discriminations between localities." (Annual Report for 1898, p. 23.)

"This Commission has no authority to require carriers to make a through route or establish joint rates." (Annual Report for 1893, p. 16.)

And there is now no power over divisions of joint rates. (Annual Report for 1901, p. 28.)

But the proposed act provides that the Commission shall have power to settle both divisions of joint rates and the "just relation of rates" by different lines at common points.

It needs no argument to show that this would concentrate in a single board power to determine the commercial and industrial future of all the various localities throughout the country.

"Every community and every pursuit is so dependent upon the agencies of transportation, so directly affected by the cost of this necessary service, that an inequitable adjustment of rates between competing towns or commodities may produce serious and widespread disaster." (Annual Report for 1893, p. 6.)

Its conception of the use of such a power was shown in the Differential Case (7 I. C. R., 669, 670). After pointing out the degree of New York's commercial importance the Commission said:

"A question is how far is this port of New York 'entitled,' or how far can that port expect to continue to enjoy that commercial supremacy? Plainly not to the same extent. It would be in accordance neither with the theory of our institutions nor with the history of the development of our nation to permit any one port upon our vast extent of seacoast to monopolize the trade with foreign nations. Within recent years the United States Government has expended large sums in improvements of other ports. These vast sums have not been appropriated and expended certainly upon the theory that it was desirable for the foreign trade of the country to flow through the port of New York alone. Rather does this recognize it as the policy of our Government that its foreign commerce should be distributed between various ports."

The Commission accordingly sustained these differentials against New York, notwithstanding the constitutional provision that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." (Art. I, sec. 9, subd. 5.) Yet singularly enough the Commission has just held that "it is no part of its duty to equalize differences in the natural advantages of localities through the adjustment of tariff rates." (Annual Report for 1904, p. 45.)

These varying principles may equally be applied to any locality in the country as may suit the fancy of the Commission. Paraphrasing the Commission's language this statute would "put into its hands the power to determine what localities shall pay and what receive tribute." (Annual Report for 1897, p. 45.) As over 90 per cent of the Commission's orders as to rates which have gone before the courts have been overruled, it is impossible to foretell what havoc would follow from the exercise of such powers.

This would be merely a further step toward general governmental regulation of commerce. Congress is not given by the Constitution any special power over the carriers. The provision is that it shall have "power to regulate commerce with foreign nations and among the several States." (Const., Art. I, sec. 8, subd. 3.) But the shipper of goods is engaged in interstate commerce equally with the carrier of the goods shipped. (175 U. S., 211; 193 U. S., 38.) The shipper and his business are, therefore, quite as much within the power of Congress as the carrier and its business. Accordingly, the antitrust act passed July 2, 1890, provides that all goods that are the subject of combinations in restraint of trade may be forfeited in transit.

In the Fifty-seventh Congress an act (H. R. 117) was introduced with the approval of then Attorney-General Knox, and passed by the House, prohibiting transportation of goods manufactured by combinations which could not be reached directly by the Federal statute. The Supreme Court has held in the lottery case (188 U. S., 321) that it is competent for Congress to prohibit transportation of lottery tickets as merchandise, and two former Assistant Attorneys-General of the United States have since published articles in the reviews vigorously asserting that this establishes the power of Congress to exclude from interstate commerce whatever it sees fit. The last Democratic platform declared that "any trust or unlawful combination engaged in interstate commerce which is monopolizing any branch of business or production, should not be permitted to transact business outside of the State of its origin; whenever it shall be established in any court of competent jurisdiction that such monopolization exists, such prohibition should be enforced through comprehensive laws to be enacted on the subject," and the Commissioner of Corporations is suggesting that a Federal license shall be required as a condition of engaging in interstate commerce—in other words, that engaging in interstate commerce as a means of livelihood shall no longer be a right, but a privilege to be enjoyed only by those possessing a license upon such terms as the Government shall see fit to prescribe. This makes it clear that the method of governmental regulation proposed would apply to all the operations of interstate commerce and would be equally dangerous to all engaged therein. The pending bill, if successful, would be merely one step in the direction of general socialism, which would affect manufacturers, shippers, and carriers alike, and would subject to governmental control the question what the citizens of the country shall be allowed to earn by the use of their constitutional rights of liberty and property.

Finally, the bill would establish rigid methods of transacting business which would tend to arrest commercial progress. The most effective cause of reduction of rates is the effort of traffic officials to enable their respective shippers to extend their business and constantly reach further markets and consumers.

"The location of new business enterprises is frequently settled since the passage of the act to regulate commerce, as well as before, not so much by the wishes of those who control them and the advantages for economical production or trade afforded at particular places as by the favorable transportation rates which railway managers can be induced to put in force." (Annual Report for 1894, p. 57.)

This process of development can be continued only through gradual reductions of rates, and in its continuance shipper, carrier, and consumer are alike interested. But this process of development will be arrested if the rates are finally subjected to the veto of a body having no substantial interest in the success of the transportation business or of the industries upon the line. Moreover, after a rate is once established under the proposed statute it will continue in effect until changed by the Commission, "upon full hearing of all parties in interest." As to who would be a "party in interest" the act contains no indication. As anyone can institute a proceeding (194 U. S., 25), it would apparently be the public at large. Such change of a rate once established could not be accomplished by act of the courts, but only of the Commission.

Every rate once fixed would thus be incapable of change without a proceeding before the Commission as dilatory as a lawsuit, and as the Commission proceeded the scope of this rigid condition of rates would constantly extend.

Every practical man must realize that business is carried on successfully by negotiation and agreement of the parties rather than by the judgment of any tribunal. There is no successful branch of business in which the general future relations of those engaged therein are regulated by third parties, whether an administrative commission or a court of justice.

If, indeed, a condition of absolute equality among different localities could be established at a particular moment of time, it would be temporary only. Industry in this country is intensely progressive, and the perfect equality of one day would probably be the grossest inequality of another. The absence of elasticity in a system of Government rate making is one of its most serious faults; thus the rate-making State commissions have had to fall back on distance tariffs on account of their inability to make those delicate adjustments which are constantly made by railway traffic officers. Such rigidity is a bar to industrial progress, and probably accounts, in a large measure, for the fact that in the States which have rate-making commissions the rates are higher under similar circumstances and conditions than in other States which have left the contract of transportation to unrestricted negotiation between the parties.

These considerations establish that such a system would be full of danger, the extent of which can scarcely be judged.

(3) SUCH A DRASTIC SYSTEM WOULD FAIL PRACTICALLY BY REASON OF THE PROVISIONS OF THE CONSTITUTION.

It may well be doubted, however, whether the proposed Quarles-Cooper bill would prove any more enforceable than is the case generally with unnaturally drastic statutes. It has been already pointed out that the Commission has no judicial quality, so that its decisions would always have to be enforced by the judicial tribunals. The procedure would therefore be as slow and complicated as at present.

The proposed act would probably not be held to confer affirmative power to establish rates for the future. Its provision in that regard does not purport in express terms to confer any new power upon the Commission. It is that any order "declaring any existing rate or rates \* \* \* or any regulation or practice affecting such rates or facilities afforded in connection therewith to be unjustly discriminative or unreasonable, and declaring what rate or rates, regulation, or practice affecting such rate or rates would be just and reasonable, and requiring them to be substituted therefor, shall become operative and be observed by the parties against whom the same shall be made within thirty days after notice, \* \* \* but such order may at any time be modified, suspended, or revoked by the Commission upon full hearing of all parties in interest."

It will be observed that this section does not state that orders so made by the Commission shall be operative "for the future." The bills as originally drawn contained these words, but their authors had them stricken out, apparently fearing that they would make the act subject to doubts as to its constitutionality. This, of course, leaves it a question of construction whether the substituted order would have future effect or would not be merely, as at present, an order with reference to past conditions. The only affirmative provision of the act fixes the date when the order shall become operative: it does not purport to grant authority to make a new species of order. It has been held by the Supreme Court (167 U. S., 479) that the Commission has no power to make an order as to the future, but, of course, has power to make orders as to the past. Can it be seriously claimed that a provision fixing the time when the Commission's orders shall become operative confers upon it the entirely new legislative power of making orders as to the future which it does not now possess?

The claim that power over future rates was conferred upon the Commission by implication and deduction was exactly what led to its grave error in attempting to fix future rates, and such methods of construction were strongly disapproved by the Supreme Court.

"The grant of such a power to fix rates is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement that no just rule of construction would tolerate a grant of such power by mere implication." (167 U. S., 494.)

The power to prescribe a tariff of rates for carriage by a common carrier "is a legislative and not an administrative or judicial function, and having respect to the large amount of property invested in railroads, the various companies

engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage is a power of supreme delicacy and importance. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful or uncertain language." (Id., 505.)

To restate the matter, the Commission now has authority to make orders as to the past, but has no such authority as to future rates; the proposed statute provides that if the Commission makes an order adjudging against a prevailing rate or practice and providing what shall take its place, the same shall become operative within thirty days; the statute does not provide in terms that this shall control future conditions, and the Supreme Court has held that no power in the Commission over future conditions can be established by implication. It is perfectly clear, therefore, that a statute providing merely when an order of the Commission shall become operative would be held to apply solely to an order which the Commission had substantive power to make; no additional substantive power could be held to arise from uncertain implication from provisions as to when an order should become operative. That method of establishing power in the Commission was precisely what was so vigorously disapproved by the Supreme Court. It is not too much to say, therefore, that this statute would probably not confer upon the Commission any additional power as to future rates.

But even if the statute conferred power of making future rates upon the Commission, various difficult constitutional questions would arise. The power to regulate commerce has, indeed, been said to be "plenary"—a word of no exact juridical meaning. But, "like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment." (148 U. S., 312, 336.) "It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guaranties." (154 U. S., 447, 479; 9 Wheaton, 1, 196; 2 Peters, 627, 657.) The provision of the fifth amendment is that "no person shall be deprived of \* \* \* liberty or property without due process of law, nor shall private property be taken for public use without just compensation." It is well settled that the carrier is entitled under such constitutional guaranties to receive compensation which is reasonable (169 U. S., 466), and that rule is adopted by the proposed act.

The character of the questions which would be open in every such litigation is stated by the Supreme Court through Justice Harlan as follows (169 U. S., 546):

"It can not be assumed that any railroad corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guaranties for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry will always be an embarrassing question. \* \* \* We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." (Id., 546, 547.)

Whenever, therefore, a rate should be established by the Commission, it would necessarily be subject to review on the issues thus stated, and the findings of

the Commission would probably not have even *prima facie* force, because the question of reasonableness would be jurisdictional and could be determined only by judicial decision. (134 U. S., 618; 169 U. S., 486.) The Commission has stated that it is unable to apply these constitutional rules (Annual Report for 1903, p. 54), but that "to some extent every question of transportation involves moral and social considerations, so that a just rate can not be determined independently of the theory of social progress." (Annual Report for 1895, p. 59.) These considerations and theories have never been defined by the Commission, and they are not embraced within the matters enumerated by the Supreme Court as bearing upon the question whether rates are reasonable within the purview of the Constitution. No argument is needed to show how difficult and overwhelming would be the litigation arising from such a situation.

Still further, as already said, the Constitution provides (Art. I, sec. 9, subd. 5) that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." But ports now exist, by statute and usage, not only at the seashore but throughout the country. On that issue also practically every decision of the Commission establishing a future rate would be subject to review, for anything of the sort varying natural conditions would be a "regulation of commerce" giving "a preference to the ports of one State over another." It is clear that very few would stand the test of this provision.

Incidentally it may be observed that the court is to hear the case on the record before the Commission and that the introduction of further testimony rests in the discretion of the court. It certainly is a startling novelty to provide that the evidence upon which judicial action is to be based shall be taken by a quasi prosecuting body which has no judicial character and is not bound by the rules of evidence (194 U. S., 25), and that it shall be discretionary with the court whether to receive evidence upon the main issue which it is to try, and which will raise a jurisdictional and constitutional question. It can not be that such a proceeding would be due process of law, for at no stage would the evidence have been taken by a judicial body.

The proposed act provides, further, that after an order has been made by the Commission it may be enforced by injunction and by action of debt for the penalties which it establishes. It is clear, however, that upon an application for an injunction the question of reasonableness of the rates would be open to litigation for the reasons stated above. Indeed, the Supreme Court has held exactly that upon any application to the courts for enforcement of an order of the Commission the merits of such order are fully open to litigation. Failure to obey the Commission's order can not give rise to any penalty. (154 U. S., 479, 485, 489.) "No question of contempt could arise until the issue of law in the circuit court is determined adversely to the defendants and they refuse to obey, not the order of the Commission, but the final order of the court." (Id., 489; see also 37 Fed. Rep., 614, 615.) This provision, requiring the courts to enforce by injunction the orders of the Commission, is therefore wholly illusory and would prove nugatory. Those orders would have no greater force than at present. There could be no proceedings for contempt until the defendant had refused to obey "not the order of the Commission, but the final order of the court."

The situation would be similar in any action of debt. In the latter case the further question would arise whether the statute does not contravene the seventh amendment to the Constitution, providing that "the right of trial by jury shall be preserved." The proposed statute seeks to make the finding of the Commission as to the reasonableness of the rate conclusive upon the jury—that is to say, the jury is sought to be deprived of the opportunity to pass on the credibility of the evidence and of the power to decide the crucial facts. This obviously would not be preserving but rather destroying the right to trial by jury.

These brief suggestions, which could be greatly amplified if necessary, make it clear that under the Quarles-Cooper bill there would be quite as much litigation as at present, and it would be quite as difficult to reach results.

#### (4) SUCH A SYSTEM WOULD NOT ACCOMPLISH THE DESIRED RESULT.

It seems unlikely that more drastic legislation would result in anything save annoyance and disappointment.

The interstate commerce act itself is a fair illustration of this. Its substantive provisions are that rates shall be reasonable, and there shall be no unjust discrimination or undue or unreasonable preference; everyone has always agreed to their justice. The procedure for their enforcement is now absolutely com-



plete. Anyone can file a complaint; the findings of the Commission are prima facie evidence of the facts found; the courts act on as short notice as they deem proper, and proceed speedily as a court of equity, but without formal pleadings or proceedings; the constitutional protection from self-crimination has been removed by statute, so that anyone can be compelled to testify; cases arising under the statute have preference over everything; individuals and corporations violating the act, whether carriers or shippers, are subject to heavy fines; the provisions of the act may also be civilly enforced by decree in equity with subsequent contempt proceedings, involving fine and imprisonment, in case of disobedience, and appeals lie directly to the Supreme Court in all cases (194 U. S., 25). In reference to no other subject-matter does such drastic procedure exist under Anglo-Saxon jurisprudence—it has no further resources. Yet at the end of seventeen years the Commission says that all this has accomplished little or nothing, and that it must, as far as possible, be made independent of the courts, apparently because they have overruled more than 90 per cent of its decisions which have been litigated. But this is a great mistake. The approximately 90 per cent of complaints settled between the parties show where the act has been effective; its provisions which represent ordinary business methods have been eminently successful. As to the remaining cases, however, experience has, in great measure, demonstrated the failure of unnaturally drastic methods.

The antitrust act has had a similar result. After giving to its first section the startling construction that it prohibited all contracts in restraint of trade, although they might be perfectly reasonable, the Supreme Court has been slowly but inevitably receding from that construction. No one has ever tried to enforce the other provisions of the act—their weakness has been too manifest. The historian Lecky well says that most of the great reforms of English history were accomplished by repealing statutes, not by enacting them.

The lesson of all this is that the constant enactment of new statutes is a very crude expedient for meeting the difficult situations in life. Any real remedy must always come from the slow but inevitable working of natural laws and from improved conditions in business and society. In the present case these natural methods have already largely done away with unreasonable rates and with preferences between individuals. As regards the remaining matter of alleged preferences between localities and kinds of traffic, the record shows that few such claims are well founded. Indeed, but two such cases have been established in the courts during seventeen years. In the face of this it is idle to claim that any good would result from still more drastic methods.

**THE REMEDY CONSISTS IN PROMOTION OF BETTER RELATIONS BETWEEN THE PARTIES AND ENFORCEMENT OF THE EXISTING LAW IN THE COURTS.**

This is the proper function of the Interstate Commerce Commission. As already said, it has done admirable work in promoting better relations by aiding in the settlement without controversy of more than 90 per cent of the complaints which have come before it. Quite possibly this better understanding might be aided, too, by the voluntary organization of joint committees of shippers and traffic officials, who would consider informally matters of joint interest and make recommendations which both sides would almost certainly adopt. The parties would thus come together originally, and the Commission be relieved of much detail. This has been already suggested by the Commission, which said in its annual report for 1898 (p. 22) that such a course "might do much to promote just conduct and harmonious relations between the railways and the public, and thus prove mutually beneficial to a high degree." In some parts of the country, as Ohio and Kansas, a successful beginning has been made in this direction.<sup>a</sup>

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<sup>a</sup> Rather curiously the efficacy of this method is fully recognized in "the transportation tax," to which reference has been made above (p. 48). The cattle growers' committee reports that it has conferred with the railroad officials and "has been met by the railroads in a very friendly and courteous manner. The committee has succeeded in accomplishing very much in the way of immediate and temporary relief. Service has been greatly improved, and in some instances rates have been adjusted upon a more satisfactory basis, while the railroad officials with whom the committee has met have shown a disposition to treat the cattlemen with the greatest fairness. The committee has realized, however, that relief granted must be of a temporary nature. \* \* \* Through its officers and subcommittees it hopes to continue the present cordial relations with the railroad officials to the end that business may be conducted with as little friction as possible."

As to the litigated cases, however, the remedy must be in the courts as it is when property rights generally are alleged to have been infringed. The statutes now provide that the hearing of such cases shall have preference in the courts over everything. The present expense and delay are due to the preliminary hearings before the Commission. Those hearings are entirely anomalous in their character and should cease, save so far as may be necessary to advise the Commission sufficiently to determine whether to institute judicial proceedings. The Commission would thus be relieved of attempting to reconcile the wholly inconsistent functions of prosecutor and judge. At present it defines itself as "not a court; it is a special tribunal engaged in an administrative and semijudicial capacity investigating railway rates and practices." (Annual Report for 1896, p. 71; Annual Report for 1903, p. 33.)

"Congress has not seen fit to grant legislative power to the Commission." (162 U. S., 216.) "The power given is the power to execute and enforce, not to legislate." (167 U. S., 501.)

To this it is now proposed to add the legislative function (167 U. S., 505, 506) of making rates for the future.

Such a combination is not recognized by American constitutional principles. It has always been a fundamental rule that the executive, legislative, and judicial functions can not be exercised by the same persons. (Federalist, 47, 66, 71.)

"The legislature makes, the executive executes, and the judiciary construes the law." (10 Wheaton, 46.)

"It is believed to be one of the chief merits of the American system of written constitutional law that all the powers entrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined." (103 U. S., 190.)

If the bill should become a law the Commission would be in the unique position of exercising all three of these powers.

As the courts have to pass ultimately upon contested cases, the preliminary hearing before the Commission is merely dilatory in its effect. As the Commission said in its annual report for 1897:

" \* \* \* What is the effect of the order thus made? Really nothing whatever (p. 31); the trial before the Commission, with all its attendant expense and consumption of time, goes practically for nothing (p. 31); our order when made binds nobody (p. 32). Nobody is compelled to obey it. Nobody suffers any penalty for refusing to obey it" (p. 33).

It is useless to compare conditions under the English act. (Annual Report for 1893, p. 16.) There Parliament is supreme because there is no written constitution. But here, by reason of the provisions of the Constitution, no form of statute can be devised which will give the Commission's orders any validity as adjudications. (154 U. S., 485.)

The justices of the circuit courts are constantly passing upon such questions, and in many cases would have the advantage of a knowledge of local conditions which the Commission can not possess. So, too, they are judicial officers appointed for life and habitually occupied with the disposition of varying questions of law and fact, while the Commission is an administrative body, the members of which hold office for a term of years only, are frequently changed, and generally have little experience before their appointment. However, it is perhaps invidious and certainly unavailing to make comparison between the two bodies. As already said, no decision of the Commission can be enforced unless it is confirmed by the courts. "Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce can not be adequately or efficiently enforced." (154 U. S., 485.)

It may be doubted whether anything substantial would be gained by establishing a special court for this purpose. The existing judicial machinery is ample to deal with the subject, and the statutes secure an immediate hearing. In the last seventeen years there have been but thirty-two cases under the act which have been brought to a final hearing. A special court with less than two cases a year seems unnecessary. Its experience would probably be similar to that in England where a special tribunal was established after much agitation and was astonished to find that it had little to do.

So, too, probably little would be gained by authorizing pooling, even if that were possible. Such contracts could not be made compulsory, and it would be as difficult to negotiate a pooling contract as to secure voluntary maintenance

of rates, and for much the same reasons. Such contracts, too, greatly encourage the construction of unnecessary roads for the purpose of forcing entrance to the pool, with the effect that the public is burdened with excessive capitalization.

But what possible advantage can there be in the Commission's preliminary hearings? As already said, time and expense would be saved by going immediately to the circuit court—the tribunal which must decide at last. The Commission will find ample and most useful employment in the administrative duties imposed upon it by statute (154 U. S., 447), the volume of which will constantly increase. "The burdens imposed upon (the Commission) under the law are quite sufficient to satisfy the most grasping ambition." (Annual Report 1893, p. 225.) It will have the time and opportunity to investigate such complaints as it can not settle and to seek the aid of the courts when it deems that course desirable. But the tedious delay will be avoided which is incident to a formal trial before the Commission, involving prolonged arguments both oral and written, and a subsequent opinion and order of the Commission. All of this it truly says "goes practically for nothing" (Annual Report for 1897, p. 21), and in more than 90 per cent of the cases which have been litigated the order thus made has been overruled.

Under section 12 of the interstate commerce act, "the Commission is authorized and required to execute and enforce the provisions of this act," and it is the duty of any United States attorney to institute proper proceedings on its request. It was, accordingly, held at circuit that the Commission might, without formal order upon its part, apply directly to the courts to enforce the statute (65 Fed. Rep., 903), and the Commission expressed approval of this method as useful in very many cases. (Annual Report for 1894, p. 7; Annual Report for 1895, p. 80; Annual Report for 1896, pp. 15, 89.) Whatever doubt may have existed as to this power has been removed by the Elkins law, so far as concerns any alleged discrimination. (189 U. S., 274.) Under this the Commission makes such investigation as it sees fit, and resorts directly to the courts when it deems the law to be violated. As the Commission states in its annual reports for 1903 and 1904, that method has proved effective. Its scope can easily be enlarged, if necessary. This would simplify the present procedure and that indicated in the Quarles-Cooper bill; it would terminate the vain attempt to blend administrative and judicial duties. It would leave the Commission free to investigate to whatever extent it deemed necessary, and to enforce the law promptly through the courts, which alone can act effectively, and to which, under the Constitution, the Commission must always resort at last.

This is the orderly manner in which all other governmental functions are administered. Under the American constitutional system the prosecutor can never be a judge in the cause. No reason has been suggested, and certainly experience has indicated none, why this great subject of Federal power should be alone subjected to dilatory preliminary proceedings, in which the prosecutor goes through the motions of possessing judicial character which it does not in fact possess (154 U. S., 479, 485, 489), and makes decisions which, as it says itself, "bind nobody and go for nothing." No useful purpose can be served by such empty procedure. The great cause for complaint is lack of dispatch in these matters. The most effective remedy would be to simplify the procedure by doing away with these useless preliminaries and going at once to the courts upon the merits of the questions involved. The present statutes provide for all possible dispatch in the courts consistent with the constitutional guaranties of liberty and property.

So far as the present law has failed, it has been because the executive branch of the Government has not vigorously enforced it. The remedies are ample as regards existing conditions, yet the executive branch has not made effective use of the power which it possesses, but has constantly demanded more power. Before anything is done in that direction the existing power should be vigorously used. This is especially the case, because, under the present system, the country generally is at peace. There is little force in the suggestion that in many States commissions have power over future rates. Where that is so the claim of preferences between localities and kinds of traffic is as acute as it ever was. On the other hand, the most intelligent State in the country is Massachusetts, the most populous and richest is New York, one of the greatest in every way is Ohio, yet their commissions have no power over rates. The second State in population and the greatest in industrial activity is Pennsylvania, one of the most prosperous is Indiana, but they have no commissions whatever; yet in these States, generally speaking, there is peace, and they contain about one-

third of the population of the country. Indeed, more than one-half of the population of the country lives in States where there are no rate-making commissions. On the other hand, nearly or quite the first State to endow a railroad commission with full power over rates was Illinois; yet its shippers constantly inveigh against the action of the commission, both as to reasonableness of local rates and preferences between localities. Indeed, whatever difficulties exist as to both local and interstate traffic center mostly about Chicago and points dependent thereon. But there is no good reason why the whole country should be subjected to such a dangerous and socialistic change because of such local conditions. If the law be vigorously enforced, they will cease to exist there as they have throughout the country generally. Failure to use existing power, whether locally or generally, does not warrant granting additional power.

The true remedy, therefore, is to ameliorate, rather than exasperate, the relations of the parties, and, discontinuing idle preliminaries, to apply at once to the courts for relief whenever the law is violated. This is the method of enforcing both private and public rights which has been adopted by Anglo-Saxon methods of government. No good reason can be given for departing from it. This course would have the immense advantage of securing immediate relief wherever it is needed, while any novel system would be experimental at the best, and must equally depend for success upon the manner in which it is administered. The suggestion of additional power has little merit in the face of omission to assert powers already possessed.

Dated January, 1905.

Respectfully submitted.

SAMUEL SPENCER.  
DAVID WILLCOX.

MONDAY, *January 23, 1905.*

The committee met at 10.30 o'clock a. m., Hon. William P. Hepburn in the chair.

#### STATEMENT OF MR. A. C. BIRD.

Mr. Chairman and gentlemen, I want to preface what I may say with a short statement.

Mr. TOWNSEND. For whom do you appear?

Mr. BIRD. No one railroad in particular, rather myself, or as one having some experience who wishes to submit practical questions to the committee.

Mr. MANN. Just tell us who you are.

Mr. BIRD. I am the vice-president of each of the railroads known as the Gould system—the Wabash, Missouri Pacific, Iron Mountain, Denver and Rio Grande, International, and Northern Texas and Pacific.

It is far from my purpose to attempt to obstruct or delay legislation or to oppose any wise measure for the proper and just regulation of great interests. I have no ready-made remedy or substitute for any of the bills which have been presented to you for consideration. My only purpose is to try to show to you some of the practical features of the subject. In fact, I think I should say, and may say fairly, that I am disposed to be strongly in favor of wholesome regulation, such regulation as is necessary to the prosperity of the country, just such prosperity as is necessary to the success of the railroads.

I candidly believe that the popular demand, if there be such a thing, for new legislation is based upon a misconception of the facts. So far as I see, so far as I know by actual contact with the people,

with the commercial cities, distributing centers, shipping communities, the great hue and cry, well justified perhaps, is for measures which will utterly extinguish the practice of secret preferential rates, and it has been so in my belief from the beginning, going back into the year 1902, when I had the honor to appear before this committee. And it seems to me that the tendency, the sum and substance, and the spirit of the bills which have been suggested in nowise touch upon the subject which underlies and gives rise to all the public opinion there is on this subject. None of the measures which have been presented, so far as I have been able to learn, in any degree whatever touches upon the main question. I think this was so two or three years ago.

You will find by the records of the Interstate Commerce Commission and by utterances of many public men who have been well informed that unreasonable rates per se have practically disappeared. That has been announced on many occasions, and the announcement is sustained by the records of the Interstate Commerce Commission. The interstate-commerce act has been in effect about eighteen years. I do not call to mind a single case where the courts have sustained any action of the Commission with reference to the reasonableness of rates per se. I think there is no such case on record. Some say that 99 per cent of the cases taken before the Commission are cases which involve the relative reasonableness of rates. In railroad parlance we say "the differential" is involved.

MR. TOWNSEND. May I ask you this, Mr. Bird: As I understand you, you say that there is no case on record where the Interstate Commerce Commission has been sustained on its ruling as to the unreasonableness of a rate per se.

MR. BIRD. That is my understanding.

MR. TOWNSEND. Has that question ever been squarely before the courts, and have they ever reversed the Commission on that point?

MR. BIRD. I do not know. But it is of record that the courts have not passed upon that question and that there are no claims—practically none—that bear specially upon that point. It is a fact that a very large percentage, a very large proportion, of all the claims or complaints that have gone before the Commission involve solely the question of differentials; some say as high as 99 per cent. I have stated it frequently at 75 per cent, and I think 75 per cent is a very conservative estimate, perhaps too low.

Whatever demand there may be for power of the Commission to make rates has its source, its rise, its growth, its whole existence in the innumerable controversies between locations, between rival markets. The Commissioners themselves, who seek more power, state that unreasonable rates per se have practically disappeared. And it is a logical conclusion that the power is wanted solely to enable the Commission or some power to adjudicate between rival communities, rival markets. And I believe that it is safe for this committee and all who deal with the question of legislation to start out with the proposition that the only purpose, the only reason, the only justification for clothing anybody with this power is that they may settle these questions of differentials.

The interstate commerce act, with its amendments, and with, in addition, the Sherman antitrust act are the laws which are brought to bear now, and the only ones that as I can see bring to bear any

power over the subject of transportation; and running through every feature, every section, every clause of those laws is made most manifest this demand on the part of the people crystallized into an act of Congress, that there shall be nothing which shall impede the force of legitimate competition; it is the underlying principle; it is the very corner stone of everything which has been done in respect to the regulation of railroads. The competition between, say, two lines running between two given points is but a drop in the bucket compared to the competition between rival markets. It may be possible for rival carriers to in some sort harmonize their differences as between two given points, for they serve identical interests; but no power has yet been devised to satisfy, allay, control, or regulate the competition of rival markets. Every large city, every manufacturing city, every town where there is a jobber, is organizing, and all such places have been organizing for years and establishing boards of trade, merchants' associations, and manufacturers' associations, and the like, and the sole purpose is to maintain the supremacy of the town which they represent.

There is a constant struggle, a never-ending struggle, and it is that which has given life to the competition of the day, perhaps the most wholesome competition, the best of its kind, that which has the best results to the people at large; and it is this competition that you are asked to regulate and control. In its wisdom Congress had enacted laws which have been construed by the highest courts as practically prohibiting the representatives of competing railways or any railways from sitting down together and discussing the merits and the demerits of certain rates and agreeing upon rates which shall be charged. It is a serious question whether any two men may safely undertake that work; and in saying this I want to be conservative, and I want to speak within reasonable limits. I believe that is true. We have been warned, cautioned, time and again against it, and in many investigations which I have attended great pains have been taken to make it manifest that the railroads had agreed upon rates, so that it is very plain, and must be plain to everyone, that the purpose of every law which has been passed upon the subject is to secure to the people all of the results of ungoverned, unrestrained competition.

Nothing has been suggested recently in the way of proposed legislation but that which overturns completely every fundamental principle that has been established or sought to be established by law up to this day. So that it seems to me the trend of affairs here is of a revolutionary character rather than evolutionary. We have been working for eighteen years, more or less, under the interstate act, always governed by the underlying principle of "no obstruction to the force of competition." I want to make it plain to you, if I can, that all that has been proposed so far is the direct opposite of all that has preceded. It may be demonstrated, possibly it can be, that the railroad companies have failed to make a proper distinction between the rights of various communities. In other words, they may not have succeeded in establishing a reasonable differential base as between various competitive localities. Certainly they have made mistakes; but I think it no wonder when the law prohibits them from the very measures which are necessary to more correct and better advised action.

Mr. TOWNSEND. That is the interstate law?

Mr. BIRD. The interstate law. Running through the interstate law is the declaration, again and again, in various forms, against the suppression of competition; but running through the Sherman Act, that is clearly prohibitive of any combination whatever.

Mr. SHACKLEFORD. You mean the opposition to pooling?

Mr. BIRD. The opposition to pooling is only one manifestation of that. It is a serious question, I think, Mr. Chairman and gentlemen, first, because it appears and is evident, I think, that in dealing with the railroad question the public and you gentlemen of Congress make the mistake sometimes of regarding the railways of the country in the aggregate, as an entity, something that acts and moves under the control of a single mind and pursues a single policy. The question before us, I think, is one largely whether the measures proposed are the measures which you want, or if the effect of the proposed measures is what the people of this country want. Every guard has been made against combinations of railroads; prohibitions have been made against combinations or agreements, so that there may be free scope to market competition.

Mr. TOWNSEND. Is there free scope? Are there no combinations?

Mr. BIRD. Perhaps. But the point I wish to make is this: That the proposition submitted, so far as I have seen, absolutely ends competition. Now, as a railway official, it is not worth while for me to waste any time on the proposition that competition may be eliminated. As a practical matter of everyday work, the measures which have been proposed will remove from the traffic manager one-half or more of his greatest burdens.

The CHAIRMAN. Let me ask you a question there, Mr. Bird. You say—not in words, but I suppose mean to say—that giving to the Commission, under circumstances, a power to fix a rate, is the overturning of all of the policy to leave competition to do its work with reference to all of the contests of markets?

Mr. BIRD. That is so, sir.

The CHAIRMAN. Is that true? Have you seen any proposition that gives to the Commission the power to fix a rate until after an investigation and after they have determined the rate proposed to be changed to be unreasonable? Now, in determining that question of unreasonableness, will not all of these questions of the competition of markets come in for their full share of review and consideration?

Mr. BIRD. I think not. I think it is impossible that they should come in. I most decidedly think so. It has been said of the measures proposed that it was not intended to give to any commission the power to make all rates, but to make a rate only after an investigation of a specific complaint. But I wish to say this, and I believe it to be a fundamental truth, that there can be no power to make any rate unless that power extends over it all; not all at once, but it must ultimately lead to that.

The CHAIRMAN. I do not believe you caught the idea that I tried to embody in that question. The Commission would not be permitted to change a rate or to fix a rate until after they had determined that the rate was unreasonable, not simply unreasonable, perhaps, with reference to that particular commodity and that particular town and that particular distance, but unreasonable in the view of

an officer called upon to look over the whole subject of transportation; and would he not be required in the discharge of that duty to look to all of these laws of commerce and these necessities of localities and this principle of competition between markets in determining that question?

Mr. BIRD. Theoretically, yes, sir; practically, I think he could not do it.

Mr. SHACKLEFORD. Let me ask you just one question there. If that were to be done, would not that be substituting the discretion of the Commission for the laws of trade and the laws of nature, which largely determine those matters?

Mr. BIRD. Yes, sir; that is the vital point. What I want to make clear, Mr. Chairman and gentlemen, is the fact of this intense rivalry between localities, these sectional questions. Take, if you please, the long controversy between the cities of Chicago and New York regarding the traffic, and rates charged thereon, to the territory south of the Ohio River and east of the Mississippi River. There is an intense rivalry. Neither party believes itself justly treated. Take, if you please, the intense rivalry between Chicago and St. Louis on traffic to and from beyond the Mississippi River. The whole face of the map is covered with such rivalries. The very moment that the power is vested in a commission to definitely settle those questions there will be such an avalanche of inquiry and complaint as was never known. I know hundreds of cases which are awaiting just such a proposition.

Mr. MANN. Would you take the specific case of the grain export trade by way of Chicago and New York, on the one hand, and by way of New Orleans or Galveston, on the other, as an example?

Mr. BIRD. Certainly. It is about 900 miles from Kansas City to New Orleans on the west bank of the Mississippi River. It is 500 miles from Kansas City to Chicago and it is something over 900 miles from Chicago to New York. The question is, How shall that grain from the Missouri Valley, from Kansas and Nebraska, reach foreign ports, whether through Galveston and New Orleans, or whether through Chicago to the Atlantic seaboard? Now, we may have a rate, it may be necessary to make a rate, from Kansas City to New Orleans which by itself would scarcely be found compensatory. The conditions of trade generally in that district must be understood and must be investigated to ascertain whether such rates can be made profitably. We find lying along the Texas Pacific and the Iron Mountain road vast bodies of timber that seek a northern market from the very territory in which this grain is produced. Taking the two articles of trade in connection, one north bound and the other south bound, rates may be found which will move the grain to those ports with some profit, and which may move the lumber back into the grain-producing territory with some profit; but in the absence of either the other would not be profitable. And a rate is found to move that grain perhaps.

I happen to know, as my attention was called to this matter last summer, when there was a large movement of wheat, a large production of wheat, in Kansas and Nebraska and Indian Territory, and not one carload of that grain was moved to the Gulf during the year 1904—I mean the crop of 1904. The lumber traffic at the rate which prevailed, and which still prevails, became very burdensome to the



carriers. Cars to move that lumber were carried necessarily from 500 to a thousand miles empty. You see how burdensome a traffic may be at some times which at other times is profitable. The great demand of New York and other Atlantic ports is that that grain shall be exported by way of the Atlantic ports, while on the other hand the people of the South are determined that their traffic shall be built up. The movement of grain by the Gulf of Mexico is comparatively in its infancy, and the people demand reasonable rates that it may move in that way. That is the status of the controversy, which is far-reaching in its effects. It was only a few days ago that the trunk lines from Chicago running to the Atlantic coast sought a means of enforcing local rates from Chicago to New York on export grain, sought to abandon the method which had previously existed, to make the basing rate from the Mississippi River, probably with good intention, and for the purpose of protecting the commission merchant's or middlemen's trade in the city of Chicago. There could be no just criticism of their effort; but the tendency was to increase the rate to the East, to the eastern seaboard.

It is the old question of rivalry; but above all things the greatest source of dissatisfaction originates and comes from the middleman. It is not the producer, it is not the consumer; the middleman is the man who makes the trouble. I do not deny that the middleman has a perfect right to be heard, a perfect right to demand and receive a reasonable comparative rate, and all that; but it may be worthy of remembrance that the producer does not complain because he has two, or three, or four available markets. The whole contention is from the middleman, the distributor of the goods, and these complaints must come to the Commission, or whoever is to control this matter, must come from all over the land, and I say, in answer to the question of the chairman, that theoretically the Commission will investigate, they will take into account all the circumstances so far as it is possible for human nature to do it.

Mr. STEVENS. In answering Mr. Mann's question you considered the movement of grain from the Southwest either by way of the Gulf or the seaboard. Would there also necessarily be considered in connection with settling of that question the movement of the competing grain from the Northwest, the Dakotas and Minnesota and those States, to the seaboard by way of the lakes and the North?

Mr. BIRD. Certainly.

Mr. STEVENS. Would there be any competition between those two territories that would necessarily be considered in determining that question?

Mr. BIRD. I think very likely all the facts relating to the grain trade, all the questions relating to supply and demand, and so on, must be taken into account; the question involves the whole country, and also the question of production and exporting.

Mr. SHACKLEFORD. If full power were given to the Commission to adjust these matters and preserve the just relation of rates, as they call it, is it probable that they would have to do it by raising the rates to the Gulf ports rather than by reducing rates to the Atlantic ports?

Mr. BIRD. Possibly, yes theoretically; but judging by our experience equalization would come by reduction.

Mr. STEVENS. I am not judging by experience; I am judging by the quantum of power that would be conferred on the Commission.

Mr. BIRD. If the higher rate would probably be reasonable in itself the only way to remedy it would be to advance the lower rate.

Mr. STEVENS. Say that the rate from Chicago to the Atlantic seaboard is now as low as it could be reasonably required?

Mr. BIRD. Yes.

Mr. STEVENS. And let us suppose that the grain rate to the Gulf is lower than the rate to the Atlantic seaboard, but within itself that it is remunerative to the carrier to engage in it. Now, how could that matter be adjusted by the Commission otherwise than compelling the carrier to the Gulf ports to raise their rates that are, per se, remunerative, up to the point where they will permit the roads to the Atlantic ports to participate in that traffic?

Mr. BIRD. The Commission would have to do just as the railroads have been trying to do for the last twenty years, to compromise, to try to please everybody.

Mr. ADAMSON. What would be the effect of the rate by way of the Erie Canal upon the rates to the North Atlantic ports?

Mr. BIRD. It has the effect of establishing the rates the railroads can charge.

Mr. ADAMSON. Grain can be sent cheaper by that canal than the rate to the Gulf, and does not that lower the rate?

Mr. BIRD. In the summer time, not in the winter.

Mr. ADAMSON. In the winter it does not compete?

Mr. BIRD. No, sir.

Mr. MANN. Suppose the Interstate Commerce Commission should, after a hearing, fix the rate on grain from Iowa points to New Orleans and Galveston, and in the same order fix the rate on grain to New York, Philadelphia, Baltimore, Newport News, and other Atlantic ports in such a way that either they would establish the actual rate or else establish the actual differential, so that that rate could not be varied without a further hearing and order of the Commission, which might or might not be had within a shorter or longer length of time; what effect would that have upon the communities and the shipment of grain and the routes?

Mr. BIRD. It depends largely upon which side of the question you are looking at it. I do not think it is in the power of anyone—the Commission or any body of men—to fix an arbitrary differential which shall govern matters of that importance that will not involve great hardships to the producer. Conditions change rapidly. A rate that might be a reasonable rate from St. Louis or Kansas City to New Orleans to-day might become very burdensome in a few months. The point I am trying to make and will bring out in answer to your question, perhaps in a roundabout way, is this, The burden of complaint will be in regard to differentials. I think that is admitted. That is the chief cause for demand for regulation—the regulation of differentials. There is no power that can establish and maintain a differential unless it has control over both the high rate and the low rate. Please to keep that prominently in view; they must have complete power or they will be ineffective. They must have the power to prohibit reduced rates. They must have the power to compel an advance of rate; or they can have no power over the establishment of a differential.

Mr. MANN. I understand you to mean that they must have the power either to absolutely fix two rates to two different points, or else

to establish relatively the actual differential, not merely to establish a maximum rate?

Mr. BIRD. The differential, yes; but in order to have the power to establish a differential they must have the power to advance or decrease a rate as they think best; they must have power in both cases or else they will have no power.

Mr. TOWNSEND. I think I understood you, in answer to the chairman's question, to say that you did not think that even after a full hearing, as contemplated by the various bills, the Commission could fix an equitable or reasonable rate. First, you said, in answer to his question, because it involved the consideration of so many other things and other rates it would affect; and, secondly, because they could not fairly accomplish that thing they could not take that into consideration. Now, when the railroads change a rate, does it not likewise and in the same manner affect hundreds of other rates?

Mr. BIRD. It does.

Mr. TOWNSEND. And if you raise a certain rate by the railroads is it not liable in the same manner to raise unreasonably the hundreds and thousands of other rates that depend upon that?

Mr. BIRD. It might be possible.

Mr. TOWNSEND. You admit that the Government has a right to regulate, do you not, and that the Government is interested for the people in the fixing of these rates?

Mr. BIRD. It is.

Mr. TOWNSEND. But you condemn giving to a commission the power which you admit ought to be possessed by the railroads?

Mr. BIRD. Not altogether so. I want to make it as plain to this committee as I can that the passage of such an act as is proposed would result in its becoming inoperative largely, difficult, and burdensome, because no such number of men can administer the affairs of this country in respect to the great traffic of the country.

Mr. TOWNSEND. Do the railroads of this country have any fixed scheme or method which they follow in fixing a rate—in raising or lowering a rate?

Mr. BIRD. No, sir; but there are so many diverse interests, so many elements of competition, that in fixing and attempting to adjust their rates the tendency is always downward. We do not glory in that as representing the railroads, but it is a fact. Please keep in mind that I have no purpose of obstructing any plan which this committee in its wisdom may report to Congress. I think the situation is so grave, the interests at issue are so numerous, that this committee should have its attention called to the practical difficulties. That is the only purpose I have in my mind to relate to you some of my experiences, which ought to have a bearing upon this question. We do not oppose, I do not oppose, the regulation. On the contrary, I think that wise legislation is what we do want. It should be reasonable and it should be protective to all the interests, not only to one. And you can not remove from the shoulders of the traffic men of this country the burdens that lie upon them so effectually as to put into the hands of a commission the power to control absolutely the question of differentials. It underlies a very large proportion of the cares that beset the traffic manager. I am not concerned especially about the disappearance of competition. That is your affair; it is in your charge; but I take it you want to understand the diffi-

culties that attach to these questions. May I cite again, Mr. Chairman, a question referred to very frequently, and originally by myself in 1902, and, I understand, subsequently by Mr. Bacon?

The CHAIRMAN. Do you prefer these interruptions or not? If you prefer to continue your argument without interruption, very well.

Mr. BIRD. I very much prefer not to have interruptions, because I am not a trained speaker and I lose the thread of my argument.

The CHAIRMAN. Very well, you may proceed without interruption.

Mr. BIRD. Let me illustrate the point I want to make by reference to a subject which has acquired some notoriety. I mean the case that came up between the Milwaukee Chamber of Commerce and the Minneapolis Chamber of Commerce. The main issue was relative rates between certain points in Minnesota and Iowa and other places to Minneapolis against rates to Milwaukee. The case was heard, perhaps, three times—at least twice. It was thoroughly discussed in a liberal manner, in a friendly spirit, between the Commissioners and the railroad people. There was no bitterness manifested. There was bitterness, however, between the rival chambers of commerce. It was a fight for supremacy; it was a fight which is going on all over this broad land. Finally, the railroad companies told the Commission: "We can not do it; you have laid down a rule for us to determine the differential. We are perfectly satisfied to accept your rule, but we can not apply it practically. There are difficulties with the geography of the railroads that prevent a reasonable adjustment of the rate, prevent such an adjustment as everybody has a right to expect. Therefore, if the Commission will fix the tariffs from all this producing country to Milwaukee and Minneapolis, respectively, we will put them into effect; we will put in force those rates." And the Commission said they were not competent to do that.

Now, following that, the railroad companies made another proposition. "We will select one or two or three members from each of these boards of trade or chambers of commerce, and if they will agree upon these tariff rates we will adopt those rates." And the effort was made. That committee did agree in a restricted territory. I think the Chairman will remember my referring to this once before and to the fact that the accuracy of my statement was disputed. He will also remember that the chairman of the Interstate Commerce Commission was present at the time I referred to it and I asked him to correct me if I was wrong. The chairman will remember that no such correction was made. The fact is that that joint committee of arbitration between those two trade bodies did agree in a restricted territory, but they utterly failed in the whole territory, and neither was satisfied and nothing was done and that case has not been settled.

That illustrates the point I am trying to make. Complicated questions, one at a time, here and there might be settled. I do not speak slightly of the power of the Commission, of its ability, of its desire to do the right thing at the right time; it is only a question of possibilities. I want to impress upon your minds, and repeat in every possible way, the fact that the whole country, from ocean to ocean and from the Gulf to the northern boundaries of the country, is covered with trade bodies, each one fighting for supremacy—not what

the law grants to them, but what they think they can get by overpersuasion, by ingenious argument. There is just as much cruelty, just as much lack of honor, just as much lack of interest in other people's rights between communities as there is anywhere between individuals; they are the same kind—selfish—each seeking his own point of view. Now, the passage of this law would open the box. The country would be covered from ocean to ocean by these complaints, and I say that it is not in the power of any commission that may be appointed to justly adjudicate or attempt to settle these questions without working an evil upon the commerce of this country. They must have the power to regulate rates and prevent competition. They must give what the law regards, as near as can be—what? A relatively just rate; fair differentials. Who knows what those just differentials are? Who can tell what is a fair differential between a rate from Kansas City and St. Louis on corn to Liverpool and a rate on corn from Chicago to Liverpool? Who can tell what the rate should be on corn from Kansas City to New Orleans and to Belgium, and the rate to Liverpool? Who can tell these things?

It may be practicable, proper, under the circumstances that exist, to move grain from Chicago, New York, or Baltimore at a comparatively low rate; there may be a great incoming tide of traffic in the opposite direction that makes a low rate profitable. Shall the people of the United States be deprived of the benefit which would accrue under those circumstances? Because there is a large amount of timber and lumber from the Southern States and Texas and Louisiana and Arkansas to the Northwest, must the grain growers of Kansas and Nebraska be deprived of the benefits of that movement? These are questions which they must consider. I only want to make it as plain as I can, if such be the case, that there are an army of traffic men, owners of railroads, officials of high standing present—those who are charged with the welfare of their properties, who study daily and hourly to see how cheap they may move the traffic of the country with some profit to themselves. There are many circumstances and conditions which affect the subject, peculiar conditions existing to-day which to-morrow may be gone, or which exist to-day and which do not apply through a season, and which should not govern or regulate in other seasons. Is it proper to deprive anyone, any community, any other producers, of the benefits which may be derived from a temporary condition of affairs? Not long ago—not many years ago—the principal movement of white pine lumber in the Middle West was from north Wisconsin and Minnesota. The cars had to go south loaded. The merchandise tariffs made at the time were remunerative because the cars had to go. The white pine timber is now cut out; it has almost disappeared; there is not more than two or three years more of that timber to be cut in northern Wisconsin.

Now, the railroad rates, established under very favorable circumstances at that time, are still in effect. They have not been advanced, but they are very much more onerous now than when they were established. The fact that those rates remained the same for some years is urged as prima facie evidence that they are now extortionate rates. The fact is just the opposite. Now, conditions are changing in the opposite direction. There is now a large movement of lumber and forest products from the South that makes it comparatively easy to move grain to the South. For a long time yellow-

pine timber was the competitor of the northern white pine. It was a struggle of many years standing, until at last the white pine of that particular part of the North became about exhausted. Now comes the enemy of the yellow pine, a wonderful production of pine on the northern Pacific coast. It is being moved to the East, down to the Middle States. Very soon you will find that in order to maintain the rates profitably there must be a movement of grain for export by the Pacific coast. Who shall tell whether the rate on grain to foreign ports from Minnesota by way of the Pacific is a fair rate; who shall tell what is a fair rate from Chicago to New York as against the rate to Baltimore or Boston? Conditions change. Conditions which vitally affect rates are changing all the time; they change daily, they change every season more or less and make a rate that was possible yesterday impossible to-day, or vice versa.

These questions are all to be submitted to a commission of five or more commissioners, and their decision shall be practically final. It is proposed that when a rate has been found reasonable by those men that it shall be in effect for a period of years, I think. I believe there is no limit. At any rate, when they fix a rate it can only be reviewed or revised by that commission. Perhaps it would be wiser if that rate should be made to run a given number of years or given time before it could be revised, say a year. There are many reasons why it should be so. There are many men handling large traffic on contracts for a term of years. Take the coal business, for instance. They must know what the rate is going to be to make their contracts. And when you provide for such interests perhaps you will provide then for a continuation of a great burden upon the people.

I do not know that I have anything further to say to take up your time. If there are any questions, I would like to answer them if I can.

Mr. STEVENS. You stated, Mr. Bird, that the decision of the Commission would be final. Now, what you meant was that their decision would be final on differentials, provided it did not confiscate the property of the railroads.

Mr. BIRD. I do not know that the proviso was considered.

Mr. STEVENS. It would have to be considered, would it not? If a rate were confiscatory then it would be unlawful. If a rate were not confiscatory then the decision would be final, as between the parties?

Mr. BIRD. I think so; I think that is the general trend.

Mr. ADAMSON. I was asking you just now about the movement of grain from the northwest by the northern water route. You said the water route made a rate in the winter time but not in the summer?

Mr. BIRD. My answer was hardly correct. The grain moves in the summer time, but there is a period of closed navigation when the lakes still make the rate to within two or three months before the opening of navigation. The elevators are filled and they are subject to the rates which will be made in the spring; such rates are the controlling factor.

Mr. ADAMSON. You mean the railroads must come somewhere near the water rate to participate in the business?

Mr. BIRD. Yes.

Mr. ADAMSON. There are four or five railroad lines, are there not, that can be used to reach the eastern North Atlantic seaboard?

Mr. BIRD. Yes, sir; five or six.

Mr. ADAMSON. Then it would appear, if there were no further facts, that the railroads simply carry it cheap while they are compelled to meet the water rate, and as soon as that is removed they take advantage of the opportunity to raise their rate; and is there any reason why it is worth more to haul grain in the winter time than in the summer time?

Mr. BIRD. Yes.

Mr. ADAMSON. What are the reasons?

Mr. BIRD. Climatic conditions. It is easier to operate a railroad in good weather than in bad weather.

Mr. ADAMSON. At the time when the navigation is closed and the railroads take all the traffic there is a very much larger volume that they carry, is there not?

Mr. BIRD. I think not.

Mr. ADAMSON. Do you think not?

Mr. BIRD. I think on the contrary.

Mr. ADAMSON. Most of it is moved in the summer.

Mr. BIRD. That raises a question. If you will permit me, the great grain market—the flouring market for wheat—is at Minneapolis. The prices made by the miller dominate the whole territory of the spring-wheat belt. Now, there are two ways of getting that grain to foreign markets—by rail south from Minneapolis, and east through Chicago; or over the Lakes, using the State railroads between Minneapolis and Duluth. That is within one State. There it takes the water rate. Those conditions do result in a lower rate than would otherwise prevail from Minneapolis to the East—a very much lower rate. It is 400 miles from Minneapolis to Chicago. Shall the railroads running due west from Chicago, running out 400 miles, make a rate that has a just relation to the rate from Minneapolis? For the conditions that affect Minneapolis do not affect Iowa or eastern Nebraska. Those things are to be considered.

Mr. SHACKLEFORD. Under this power given to the Interstate Commerce Commission by these bills would not the Commission have authority to tell those water lines to raise their rates to a point to permit the railroads to compete?

Mr. BIRD. I am not familiar enough with this bill or any particular bill to answer that question in the light of its provision.

Mr. STEVENS. Suppose the Interstate Commerce Commission has no jurisdiction at all over water lines, as they ought not to have?

Mr. BIRD. Wholly by water?

Mr. STEVENS. Yes. What then?

Mr. BIRD. Then the water rates would dominate the situation.

Mr. STEVENS. Supposing that there was a through water line from Duluth to Montreal under one control, as there is, operated by a man who owns it, a first-class man. Would not that, then, practically control the situation in that territory?

Mr. BIRD. Yes.

Mr. STEVENS. Would not that have an effect as to the southwestern territory, then, in this way: In wheat for milling there is required to be a mixture of the hard wheat of the north and the soft wheat of the southwest?

Mr. BIRD. Yes.

Mr. STEVENS. Would not the market for that southwestern wheat then be fixed by the demand for it by mixing with the hard wheat of the North?

Mr. BIRD. Yes.

Mr. STEVENS. And that the price of that mixture would be determined by the water rate to the continent of Europe?

Mr. BIRD. Yes; that is a fact.

Mr. SHACKLEFORD. Then ought not the Commission to have power over that water rate to so regulate it that Chicago could get into the competition?

Mr. BIRD. They ought to have power, and if they are to control the rates of the country they must have it.

Mr. SHACKLEFORD. Has it not been suggested here to put the water transportation under the control of the Commission, the same as the railroad transportation?

Mr. BIRD. I was not aware of that. I have understood that when transportation is part by rail and part by water it is under the law and is subject to the supervision of the Commission; but when it is wholly by water I do not understand that the Commission had anything to do with it. But it is a fact that in order to control rates at all, to regulate differentials, the Commission must have power over all rates, whether high or low; they must have power to say that this rate is too low and you must raise it, or that this rate is too high and you must reduce it; although the tendency from our experience is that they would reduce the higher rate even although it was reasonable per se.

Mr. SHACKLEFORD. If the Commission had this power to adjust rates, if they were given full power to preserve the just relation of all rates, would they not be just as apt to say that rates were too low in some cases as too high in others?

Mr. BIRD. I think not.

Mr. SHACKLEFORD. Is not that a part of the power the Interstate Commerce Commission is seeking to have conferred upon them in order to preserve just relations of rates; that is, the power to increase the rates that they think are too low as well as the power to reduce rates they think are too high?

Mr. BIRD. Yes; but the point in my mind is this. That care has been exercised heretofore to prevent any restriction of competition—it underlies all the acts that have been passed.

Now, here is a measure which is the very opposite. Is it the intention of this committee and of Congress to pass an act which is revolutionary? I am speaking only as an individual, interested in the prosperity of the country. This is in the trend of suggested legislation. It is to create a monopoly greater than the world has ever known; to put the traffic of this country into the hands of half a dozen men.

Mr. SHACKLEFORD. Would there not be a relief from that if the railroads sought to have a law passed authorizing them to pool; making the Commission act as the trustee not only for the unified railroads, but also for the people at large?

Mr. BIRD. I do not know that the pooling of railroad freights is essential. It may be in some cases. I do not know but what in the long run it would be beneficial. I am in doubt about it, but I am



inclined to favor it. But what is the use of a pool if the rates are less than cost?

Mr. SHACKLEFORD. But could not the Commission compel them to be about cost, so that they would be fairly remunerative? If all the railroads were pooled and the Commission were given the right to raise or lower the rate—that is, to administer that trust in the interest of all the people, would not the Commission see to it that the railroads would earn fair dividends?

Mr. BIRD. Well, if any means can be devised to enable the roads to earn a fair dividend, then I think it would commend itself to the railroad people very strongly.

Mr. LAMAR. You say that quite a number of the rates are too low?

Mr. BIRD. Undoubtedly.

Mr. LAMAR. Why do not the railroads raise them?

Mr. BIRD. How can they? Under competition I may be making a rate that compels my competitor to put his rate down below what is reasonably profitable. So I go to my competitor and we agree on a rate, and then if we do and it is proved on us we go to jail.

Mr. LAMAR. What I mean is this: Those that are fixed too low are fixed by competition?

Mr. BIRD. Competition among themselves or competition between rival markets.

Mr. LAMAR. Does it almost necessarily follow that if railroads fighting among themselves have to in business make quite a number of rates too low, that then in order to even up they will make quite a number of rates which are too high?

Mr. BIRD. That is a popular fallacy.

Mr. LAMAR. Suppose it is the fact and not a fallacy. Who is to determine whether or not that rate is to exist, the railroads or a board of commissioners?

Mr. BIRD. I hope I have not made myself understood as opposing wise restrictive legislation.

Mr. LAMAR. But, Mr. Bird, I would like you to confine your answer to that question. If the public believes—and there is a thorough conviction in the minds of the public on that question—that not only hundreds, but thousands of rates may be too low, made in the struggle for business, on the other hand, the railroads have, in order to compensate themselves, made thousands of rates too high. Now, the public wants the rate reduced. The railroad will not reduce it. Who is going to settle that question? The railroad will not reduce the rate, the public wants it reduced; the railroad thinks it is about high enough, the public thinks it is too high. Who is going to settle that question?

Mr. BIRD. We have the courts, and the courts would settle it.

Mr. LAMAR. Take, for instance, cantaloupes and watermelons, strawberries, and other fruits shipped from my State in large quantities. Those people may ship by virtue of being buyers from the middleman or speculator. Thousands of them may pool together in carloads among themselves. They think the carload rate is entirely too high. The railroad says it is not excessive. Who is going to settle that question?

Mr. BIRD. The court.

Mr. LAMAR. The court?

Mr. BIRD. How else can it be settled?

Mr. LAMAR. You mean by each shipper going in and bringing a suit?

Mr. BIRD. No; not necessarily a shipper; anybody that is interested.

Mr. LAMAR. A suit for damages?

Mr. BIRD. Yes; anybody that may be injured.

Mr. LAMAR. That is exactly the point; that is what the people do not want to be subjected to. They object to interminable suits for damages, individually or collectively. They want to give to the intermediary body the power to fix the rate in this fight between the railroads and the people as to whether a rate is reasonable or not. Nobody wants an unreasonable rate imposed, but there is an irrepressible conflict between the railroads who fix rates on the one side, who believe them to be fair, and the public on the other side, who believe the rates to be excessive. And there you are. And if this body does not exist you will have suits with all the delays incident to them and trouble in solving the question. I am speaking on the point of the absolute right to fix a rate vesting in the railroad companies or the public through an intermediary body of some kind. I appreciate your argument from your standpoint, that it is too vast, too complex, almost too disastrous a power, you might say, to confide to men that you believe, I may say plainly, to be incompetent to do the business.

Mr. MANN. May I ask you one or two questions in reference to the subject of differentials, as a practical railroad man?

There are several or a number of roads carrying grain, say, between Chicago and New York and other Atlantic ports. Between Chicago and New York there are several roads that I think they call direct roads, or some term of that sort; and other roads that run in a more roundabout way. The roundabout roads get a differential, I understand?

Mr. BIRD. So called.

Mr. MANN. That is, they are permitted to carry grain for a little less price than the direct roads?

Mr. BIRD. I do not think that is so in regard to the carrying of grain; there is a difference in passenger rates. I think there is a difference in the merchandise rates.

Mr. MANN. Yes. I suppose, as a matter of railroading, it costs less to carry the freight on the direct road than it does on the roundabout road?

Mr. BIRD. Possibly not; it depends on the circumstances. But as a general proposition, certainly it does cost less for the shorter haul. But there may be conditions which make it profitable for the longer road to carry it for a little less.

Mr. MANN. The roundabout road carries it for less?

Mr. BIRD. Yes.

Mr. MANN. Have not the public a right to say that that freight shall be carried in the cheapest manner possible, and to require that the rates shall be made on the basis of the cost of carrying it by the most direct road?

Mr. BIRD. I think it may be so. I want to avoid confusion of terms in the use of the word "differential." There is a differential between the same points, between different railroads, to the effect that the road giving inferior service is authorized to charge a little less. But the

broad proposition in its general use is a differential, say, between St. Louis and Chicago and Kansas City and Chicago. There is a difference against St. Louis that is a trade differential.

Mr. MANN. Take the roundabout road. It carries merchandise from Chicago to New York. It must be supposed to make some profit or it would not carry the merchandise. Now, if it can afford to carry it at the rate it does carry it, ought not the direct road be compelled to carry it at a less rate than they charge, which is higher than the charge demanded by the roundabout road?

Mr. BIRD. I hardly think so. Assuming that the rate by the direct line is a reasonable rate in the first place, the circumstances may be such as to justify a longer road, a road giving inferior service, in performing that service for a little less money, because of this proposition: that there is nothing so disastrous to a railroad as no traffic; it is worse than having traffic at low rates. The making of rates is not an exact science. There is not a tariff in the United States, according to my best belief, that has been made on any scientific basis. No one has been found that knows enough to make such a tariff. The fact is that rates are made by comparison, compromise, and competition, and those are the underlying forces that determine what the rate shall be.

Mr. BURKE. What effect does the cost of service have upon rates?

Mr. BIRD. I do not think that anyone can make a tariff with sole reference to the cost of service.

Mr. MANN. You speak of the inferior service in carrying by the roundabout road.

Mr. BIRD. Yes; I mean the longer time required.

Mr. MANN. The goods get there, and it does not make any difference, unless the man wants them by a certain time. But if the roundabout roads can afford to carry merchandise for, say, 70 cents a hundred from Chicago to New York, why should the direct road, with the shorter haul, be permitted to charge 75 cents a hundred?

Mr. BIRD. I think the answer must be qualified. To restate it, if the higher rate over the short line is reasonable there may be circumstances, and often are circumstances, that justify the inferior route in hauling the same traffic for a little less money.

Mr. STEVENS. That is, to instance a case, the Baltimore and Ohio Railroad is a roundabout route, but hauls an immense amount of coal west, and they could afford to haul a certain class of freight cheaper to the east on that account?

Mr. BIRD. Yes, sir; they could afford to do it cheaper on that account. I know of a case where limestone of high quality is carried in large quantities to Pittsburg at a very low rate. Notwithstanding the rate is very low, it is profitable, because those cars are used, primarily, for hauling coal to tide water, and if they do not load back with something it costs nearly as much to carry them empty as it does loaded.

Mr. BURKE. What per cent of business is handled by a railroad company where the rate is not remunerative?

Mr. BIRD. I do not know, and I do not know anybody that does know.

Mr. BURKE. Is it not a fact that there is a certain per cent of freight handled by a railroad company at a loss?

Mr. BIRD. I think I know some rates about which there is a question. I do not think it is safe to say that there is a large per cent of traffic hauled at less than cost.

Mr. BURKE. At the same time you expect to meet competition.

Mr. MANN. May I ask if this is the basis upon which you fix freight tariffs, or many freight tariffs: That after absorbing your natural territorial freight business—

Mr. BIRD. Local business?

Mr. MANN. Well, your natural territorial freight business—that you then propose to make a rate upon other commodities which would not naturally go over your road, wherever you can obtain freight enough to more than pay operating expenses?

Mr. BIRD. I think there was a time when that was a dominating condition, but I think in the last ten or twelve years it has been fading away and there is less of it, and that there is very little of it to-day. It has been found that the policy works both ways, and it is disappearing.

Mr. LAMAR. One more question and I will not interrupt you any more. I would like to ask for my own information as to how you make rates, the principle upon which you make them, leaving out the questions of whether a particular rate is just or unjust or the trouble of the railroads between themselves; leaving out all these questions, is not one of the basic principles of rate making on a railroad, without reference to any particular railroad, based on the relation of the rates fixed for producing earnings to the capitalization of a road; in other words, will rate making on any road bear a direct relation to the capitalization of the road?

Mr. BIRD. I never knew a case in forty years' experience. I have never known a case where in the adjustment of rates the capitalization of a railroad was taken into account.

Mr. LAMAR. How does the question of paying a profit on the capital invested enter into the question of making rates? Suppose a railroad is capitalized at \$25,000 a mile and another railroad at \$50,000 a mile. I would not put a dollar in a railroad unless I expected a dividend on it.

Mr. BIRD. A good many people have.

Mr. LAMAR. If that be true, how would you invest except on the theory that the rates which the men controlling the railroad and operating it would make would earn a dividend on the stock and interest on the bonds?

Mr. BIRD. So far as I know about railroads I do not think I would invest a dollar in one. I do not think it is a good investment, as a rule. I think it may be very poor; it may not.

Mr. LAMAR. Some good business men have invested in them and built them.

Mr. BIRD. Building them is another proposition.

Mr. KYLE. You can build them and sell them.

Mr. LAMAR. I would like to have an answer on that question.

Mr. BIRD. I will endeavor to answer it.

Mr. LAMAR. I am a little bit surprised at that if that be true—that the fixing of rates does not have a direct relation to capitalization.

Mr. BIRD. I do not think it has; I do not think that the bonded and the stock debt of a railroad was ever taken into account in making up a tariff. The making of rates is not a science. I think it

can not be stated fairer than as I have stated it—that it is a matter of comparison, compromise, and competition. I know railroads hundreds of miles in extent where there are innumerable local stations, and yet where there is no strictly local traffic. There is always some other element than cost which fixes the rate.

Freight is classified in 10 classes, from 1 to 5 and from A to E, and besides that there are a number of tariffs which are known as commodity tariffs. They are grain, coal, lumber, live stock, and ore, etc. All freight has to be covered somewhere in that wide range of classification. Now, there is not a man alive that can tell what freight a particular class will furnish, how much a class will furnish, and you can not fix a rate on any one article knowing what revenue it will furnish.

Mr. LAMAR. The reason I asked this question is that when I was with the attorney-general in my State there was considerable litigation with the railroads, and the question came up, at least ultimately, as it seems to me it will always come up when rates are challenged, as to whether the roads should not be permitted to earn compensation upon their service rendered or money invested, some form of ultimate property rights; and in my State it has been determined time and time again, the question has been settled, and the railroads have raised the question directly, not only while I was there, but since my going out, the question has been raised with my successors in office, as to reasonable compensation on the capital invested. That is about the ultimate question. So I ask that with the view to the national effect of challenging the rates on all the trunk lines of the country. Is not that question of capitalization at least one of the basic principles? I ask that because I state frankly in our State when they come to tax the railroads we find they are worth \$6,000 or \$7,000 a mile and they are capitalized at \$40,000 or \$50,000 or \$60,000 a mile. I had not quite reached that question when I was there, but we were coming to it.

Mr. BIRD. Take a railroad capitalized at \$100,000, say, and it is entitled to a fair return on that money if it is rightly located. Now, how are they going to get any tariff rate that will produce approximately that profit? The revenue is derived from thousands of items in the classification. It is a mere matter of judgment what relation the tariff on one class should bear to the tariff on another class. It is unknown what relation fifth-class freight bears to the total freight of the railroad or any other class bears to the total freight of the railroad. It is a matter of evolution, of continued experiment, but underlying it all in fixing the rate on any classes of freight there is a controlling power of competition somewhere, somehow, and I have never yet in my forty years' experience been able to make a tariff with any reference to what the service was worth.

Mr. RICHARDSON. Right there in that connection, is it not commonly accepted and understood that if the Interstate Commerce Commission undertakes to fix what is called the reasonable rate, is it not based on an examination of what the railroad cost, its buildings, its expenditures for all of its betterments, and all of its equipment, and not only that, but its bonds, too?

If the Interstate Commerce Commission did not take all those things into consideration in fixing what it termed a reasonable rate, could not the courts hold, would not the superior courts hold, and

would it not be their duty to hold, that that was not a just, fair rate, because they were entitled to a fair profit on the consideration of all those things?

Mr. BIRD. I think so. I am not a lawyer and can not pass very intelligently on these subjects. But I want to put the question in a little different way, if I may explain.

Mr. RICHARDSON. Certainly.

Mr. BIRD. The court may hold that the railroad is earning more than it is entitled to. The Commission may hold in the consideration of a particular rate on a class of articles the fact that because the railroad is earning more than it ought to that the rate on a particular article is excessive, but that does not give any light on that one subject. If you are investigating the rate on groceries, on sugar, the fact that the defendant railroad is earning more than it ought to earn or less than it ought to earn affords not one ray of light upon the reasonableness of that one rate, because the charge for transportation is spread out upon all the articles that are transported, it is distributed, and there are varying rates for each class of freight. Now, what proportion is properly chargeable to sugar?

Mr. RICHARDSON. That gets back to the question of reasonable rates fixed upon the cost of transportation to the railroads.

Mr. BIRD. But what freights? It is very difficult to determine that because a railroad is earning more than it should that the rate on beeswax is too high, or because the railroad is not earning enough that the rate on dry goods is too low. It is the whole traffic upon which the transportation charge is levied by the railroads of the country in the adjustment of its tariffs and classifications.

Mr. TOWNSEND. I would like to ask you one or two questions in regard to the testimony you have given. Do you claim that there are any unjust classifications in existence now?

Mr. BIRD. No, sir; I make no claims; but I must admit that there are a great many claims that there are unjust classifications.

Mr. TOWNSEND. But what is your opinion about that, whether there are any?

Mr. BIRD. I know some cases which I would adjust in a different manner if I had the power.

Mr. TOWNSEND. The railroads themselves have recognized that there are unjust differentials existing?

Mr. BIRD. I think they may admit that there are unwise differentials.

Mr. STEVENS. You might be wrong in your decision?

Mr. BIRD. Precisely.

Mr. STEVENS. Or any other man might be?

Mr. BIRD. Probably; it is a matter of judgment.

Mr. TOWNSEND. Now, if there are any unjust differentials ought not that to be included in the powers given to the Commission?

Mr. BIRD. That is the whole thing.

Mr. TOWNSEND. Will you just answer me what your opinion is? Do you think, if there are any unjust differentials, that the Commission ought to have power to regulate differentials?

Mr. BIRD. I have not expressed my opinion on that subject, but I want to say this: The thing I am trying to get you to consider is what power you should give to the Commission, if you give them that power—I do not deny or admit—I only want to point out the prac-

tical difficulties which are confronting you. If you do admit that there are unjust differentials you must give somebody the power to fix them, and you can not give them that power unless you give them power over all rates, a power to advance the lower rates as well as to depress the higher rates.

Mr. TOWNSEND. Now, is it a fact that the railroads themselves have been unable to settle that question of unjust differentials?

Mr. BIRD. Because you gentlemen in your wisdom have said: "If you do you shall go to jail." Why? There is a penalty attached.

Mr. TOWNSEND. You do not deny but what the railroads of this country do make combinations, notwithstanding the fact that they are liable to go to jail?

Mr. BIRD. "The railroads" is a very broad term.

Mr. TOWNSEND. To your knowledge?

Mr. BIRD. I think they must. I think if not there would be more or less rate anarchy all over the country.

Mr. TOWNSEND. I want to ask you a question that I have asked several other experts here. Is it a fact that the differentials existing between the ports of New York, Baltimore, Philadelphia, and Boston is a matter that the railroads have been unable to settle among themselves and have voluntarily submitted to the Interstate Commerce Commission with an agreement to abide by the decision of the Commission?

Mr. BIRD. I believe that to be so.

Mr. TOWNSEND. And is it not a fact that this Commission is empowered under these bills to obtain all the information that you know?

Mr. BIRD. Yes.

Mr. TOWNSEND. And this Commission is supposed to be on impartial body?

Mr. BIRD. Yes.

Mr. TOWNSEND. Now, would it not be safe to intrust these interests to a commission having as much knowledge as you have, an impartial commission, as it would be to trust the people's rights entirely with the railroads?

Mr. BIRD. That may be so; I do not deny it.

Mr. TOWNSEND. Now, do you know of any article that is carried at a loss?

Mr. BIRD. No, sir; no more than I know of any article that is carried at a profit.

Mr. TOWNSEND. Yes; you can not tell that?

Mr. BIRD. No.

Mr. TOWNSEND. So that if you are carrying or transporting any product over your road it will be impossible for you to tell whether you are carrying that at a loss or profit?

Mr. BIRD. You can arrive at a very close approximation.

Mr. TOWNSEND. Could not the Commission do the same thing?

Mr. BIRD. If there were hours enough in the day and days enough in the year.

Mr. TOWNSEND. There are as many hours for them as there are for the railroads?

Mr. BIRD. Oh, no. Railroads are operating in diversified parts of the country—all over the country—independent of each other, working out this question; they cover it all.

Mr. TOWNSEND. You spoke something about the courts. Do you believe that there should be a separate court established to determine these questions?

Mr. BIRD. I hope you will excuse me from answering any questions of a legal character.

Mr. TOWNSEND. All right.

Mr. RICHARDSON. I have not heard all of your statement, but right here, if you are willing to give it, I would like to have your opinion as to whether any legislation at all is needed on the subject of regulating railroads by the Government or any further legislation than we already have.

Mr. BIRD. I do not believe there is.

Mr. RICHARDSON. You have read this, have you not?

The Government must in increasing degree supervise and regulate the workings of the railroads engaged in interstate commerce; and such increased supervision is the only alternative to an increase of the present evils on the one hand or a still more radical policy on the other. In my judgment the most important legislative act now needed as regards the regulation of corporations is this act to confer on the Interstate Commerce Commission the power to revise rates and regulations, the revised rate to at once go into effect and to stay in effect unless and until the court of review reverses it.

That is the President of the United States. You do not agree with him on that?

Mr. BIRD. I do not in detail—

Mr. STEVENS. I would like to ask one question. You stated that you had no particular scheme in planning a system of rates. Do you have precedents? That is to say, because a certain rate was made at a certain time is that a precedent in the sense that a precedent is established by the ruling of a court; is that a precedent for making other rates?

Mr. BIRD. I do not know that I have your question precisely in my mind.

Mr. STEVENS. You understand that courts very often in citing cases establish precedents?

Mr. BIRD. Yes.

Mr. STEVENS. Do you have that in mind at all in making your rates or changing your rates?

Mr. BIRD. We must be governed more or less by precedent; but precedent is a very dangerous thing unless all the circumstances and conditions which lead to it are duly considered.

Mr. STEVENS. It always is, of course.

Mr. BIRD. And the trouble is railroads have been making precedents in that way which have been accepted by the courts and commissions as ones which afford a fair standard, whereas they may be exceedingly unfair; the conditions may have changed. As I said before, a rate on lumber from Texas to Chicago may be reasonable, may be perfectly fair, if there is a compensating tonnage south bound; and if that south-bound tonnage disappears, then the rate which has been established and has been made to appear as a precedent would not longer be a fair precedent and it would not be fair to judge by it; it would not be a fair standard any longer.

Mr. MANN. The Interstate Commerce Commission reports that in the year ending November 30 last there were over 162,000 new tariff schedules filed with that Commission, most of which, as they in-



formed me, contained changes in tariff rates. From your own experience can you say in your case what proportion of those have been made on the initiative of the railroad and what proportion have been made at the request or suggestion or complaint of communities or shippers?

Mr. BIRD. I have not been actively engaged up to within the last year and a half or three-fourths in establishing tariffs or changing them and have not been in touch with them all of the time. I believe that in most cases, a large percentage of the cases, it has been on public demand. I think, in the very nature of the case, it may be taken for granted that a change of rate has been made to meet some local demand.

Mr. STEVENS. Could you give any estimate as to the proportion of traffic on your line or the Northwestern Railroad which moves on commodity rates and what proportion moves on class rates?

Mr. BIRD. You must understand that there is a commodity tariff and a commodity rate. The commodity tariff is the grain tariff, which is fixed, and so with live stock and lumber and coal, and so on. They are all commodity tariffs. The rate that is made for some particular purpose, to meet some necessity, is called a commodity rate. I could not begin to tell you what percentage is moved on commodity rates, but it is not a very large percentage. It can not be.

Mr. MANN. It is the commodity tariffs I have in mind.

Mr. BIRD. A commodity tariff should be regarded as in no respect different from a tariff, because the tariff usually prescribes rates on freight in classes 1 to 5 and A to E, and on the other side of the page, facing it, is the rate on grain and lime, lumber, coal, iron, and live stock, and so on.

Mr. RYAN. Carload lots or more?

Mr. BIRD. Yes. In the classification from 5 to E they are carload lots; less than carload lots, from 1 to 4, inclusive. The commodity tariff is one thing and the commodity rate is quite another thing, and when one says the commodity tariff is quite a large percentage that is true, but it conveys a wrong impression. The commodity rate from Chicago to Rockford on raw material for manufacturing purposes is a commodity rate.

The CHAIRMAN. Our time is up.

Mr. BIRD. I thank you, Mr. Chairman and gentlemen of the committee.

Thereupon, at 12 o'clock, the committee adjourned until to-morrow, Tuesday, January 24, 1905, at 10.30 o'clock a. m.

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TUESDAY, January 24, 1905.

The committee met at 10.30 o'clock a. m., Hon. William P. Hepburn in the chair.

#### STATEMENT OF MR. A. C. BIRD—Continued.

The CHAIRMAN. You began on the explanation, or at least I thought you did, of why a railway company would accept a rate or establish a rate that was not a remunerative rate. I wish you would explain why that might be.

Mr. BIRD. A rate may be so low that it will not contribute fairly to the general expenses of the company. It may be so low that if applied as a basic rate the whole traffic would be unremunerative, but at the same time it might be big enough to more than pay the actual cost incident to its own transportation, and thus contribute something toward the general expenses of the company. It has been held frequently, I think first by Judge Cooley when chairman of the Commission, that that was a correct view of the subject. I can not state cases in detail, but I am quite certain the same opinion has been announced by some of the judges of the United States courts. I am not sure on that point. It is a fact that the railway companies have proceeded on that theory, more in the past than recently, and for this reason: Rates made under such circumstances have been taken and have been regarded by the State and interstate commissions as a voluntary act, and therefore a just criterion as to their reasonableness and fairness, and such rates have been used often for the purpose of making other rates, and the practice, although it continues to such extent, is not as general as it was, because it is considered hazardous to do so. There was one limitation that I should have put upon that. The opinion among transportation men has been that if the rate paid more than the actual cost incident to its own transportation, and did not unfavorably affect other rates, then such low rate might profitably be made.

Mr. RICHARDSON. Did I not understand you to say the other day that the common popular idea that a railroad ever made low rates was a fallacy?

Mr. BIRD. What is that?

Mr. RICHARDSON. Did not we understand you the other day, in answer to Mr. Lamar, to state that the popular idea that a railway ever established low rates for a certain purpose was a great fallacy? You used that language, did you not?

Mr. BIRD. I do not recollect that exact language. I do not get the connection in my mind as to what was being discussed.

Mr. RICHARDSON. In answer to a question by Mr. Lamar, who was sitting just to your right, as to whether, when a railroad made a low rate, it did not make it sometimes for the purpose of discrimination, you answered that.

Mr. BIRD. I think that answer might be in the negative. I do not know any case where rates have been made low deliberately and purposely for the purpose of discrimination. I do not recall any.

Mr. RICHARDSON. I do not recall it distinctly myself. I was asking you for information.

Mr. BIRD. I do not recall any place where the railroads made a low rate purposely and deliberately for the purpose of creating a discrimination, but I think they have made rates low, as I have described, which may have been considered by others as having been made for the purpose of discrimination.

The CHAIRMAN. Is it not true that the revenues of a railroad company are applied to four purposes, the payment of what you call fixed charges, the payment of maintenance of track and equipment, the cost of the movement of freight, and the payment of dividends?

Mr. BIRD. Yes, sir.

The CHAIRMAN. Do you not often speak of and treat almost as though they were separate those four funds?

Mr. BIRD. I am not an expert in railway accounting, but I know enough by induction to know that the expenditures of a company are classified by the auditors under certain heads, such as payment of interest, and so forth.

The CHAIRMAN. Is it not true, then, that a rate which would make its contribution to two of those purposes, say maintenance and movement of freight, might be desired, while it would not contribute at all, or contribute its share, to fixed charges or to dividends?

Mr. BIRD. It is true. It might be narrowed closer than that. It might contribute to only one, such as the cost of transportation. That is one of the general heads of the expense account. It might contribute more than its share to that item simply, but nothing to the other three general heads.

The CHAIRMAN. By "cost of transportation" you mean those expenses that are appropriated to the movement of trains?

Mr. BIRD. Yes, sir.

Mr. TOWNSEND. Is it not true, also, that you keep, or should keep, another account as well, namely, betterments, or whatever you choose to call it?

Mr. BIRD. I only have the most general knowledge of railroad accounting. I know, as I have said, by hearsay and by being in constant touch with the general affairs, that these accounts are kept, and they are distributed primarily under three or four heads, perhaps, and then redistributed under branches of each general head—maintenance and betterment, and all that sort of thing; and those accounts are all kept very carefully, and there are reports made under each to the Interstate Commerce Commission, and just how they are classified, and so forth. I think they are spread very fully and explicitly on the records that are sent down to the Interstate Commerce Commission.

Mr. TOWNSEND. According to your testimony yesterday—and I believe it has been the testimony of others—you do not know exactly how to go to work to fix a particular rate, not knowing what it costs to move that particular product itself, so that at the end of the year, or at the dividend period, whatever time that is, you look over and determine whether you have made any money or not, and you determine by that whether your rates are sufficient or not?

Mr. BIRD. Whether the rates in the aggregate are sufficient.

Mr. TOWNSEND. Whether in the aggregate they are sufficient or not. Now, if it is true that you have been carrying at a loss and you have had a rate that is lower than it ought to have been, but you still have made money, is it not true that you have had some products that you have carried in excess of a reasonable rate?

Mr. BIRD. It does not necessarily follow. It would depend largely on the final result. If the final result showed that the property had earned more than its value entitled it to, I think in that case your proposition would hold good.

I ask, Mr. Chairman, to correct one statement in what I said yesterday. Mr. Richardson asked me a question and read from a paper a certain extract from the message of the President, and asked me if I disagreed with him. I answered simply in the affirmative that I did. I want to amend that by adding the words "in some detail."

The CHAIRMAN. Very well.

**STATEMENT OF MR. S. H. COWAN.**

Mr. COWAN. I appreciate the position of the committee in respect to time, Mr. Chairman, and if you will give me forty minutes I will get as far as I can in the presentation of the arguments and facts which I wish to produce before the committee, and then if there are still further facts I want to lay before you I will call the attention of the committee to it.

The CHAIRMAN. With the number of gentlemen who are here this morning to be heard, we can give you only thirty minutes, I am afraid.

Mr. COWAN. I think, considering the great importance of the interests I represent, and the great amount of freight which they have to pay, I ought to have more time, but I accede to the committee's desire.

I understood that it would be necessary for the committee to limit the time of the witnesses, not that they desired to prejudice anyone at all, but because time is important. I therefore have prepared a statement which goes into the matter somewhat in detail, but not more so than ought to be done to present to you what ought to be known to every member of this committee. I beg the attention of the committee for the purpose of calling attention to the matters which I have stated at length and more in detail in this paper than I can state them here this morning, and I make the request that this may be printed as my statement on these subjects; and when I have finished I will hold myself ready to answer any questions that any gentleman desires to ask, if the time is given to do so.

I quite agree with Mr. Bird and a number of these railroad gentlemen, that you have before you a very important question. I have had some experience in this matter. Not in the way of bragging about it, but in the way of stating a fact, I will say that the Cattle Raisers' Association of Texas, which I represent, engaged in the business of undertaking to bring before the Interstate Commerce Commission, and to have determined, the question as to whether or not the terminal charge of \$2 a car at Chicago, put into effect by an agreement on the part of the railroads in 1894, was a reasonable charge. The cattle producers and shippers in every Western State, including all of the States in which that business is carried on in the western part of the country, west of the Chicago meridian, were interested to the extent that there have simply been added \$2 a car above a long prevailing rate for the delivery of their live stock at Chicago, and some millions of dollars have been paid out on that charge.

The Cattle Raisers' Association of Texas undertook a prosecution of a case before the Commission in 1896. I have had to do with that subject since that date and have carried the case through the Commission, through all of the courts, and then back to the Commission again. It has been tried; the testimony has been completed and is now ready to be briefed to be submitted to the Commission for decision. At the same time I have represented the Chicago Live Stock Exchange in a case before the Commission involving the right of the railroads to charge the shippers a higher or greater rate for the transportation of cattle than they charge the packing houses on the Missouri River for a longer distance. That case was decided a few days

ago, and it was held that such a discrimination was unjust and unlawful and that the shippers are entitled to a rate of 18½ cents a hundred pounds for the shipment of cattle to Chicago if the packers are entitled to 18½ cents per hundred pounds for the dressed product. The decision was manifestly just and ought to be enforced.

The Cattle Raisers' Association of Texas have deemed themselves injured by the action of the railways in advancing the rates, and last February they filed a case before the Commission, and that has involved all of the southwestern rates and all of the rates from the southwestern territory to the northern ranges, and therefore the cattleman in every State west of the Missouri River is vitally interested in that case. It was filed in February, and the greatest expedition has been practiced in the taking of the testimony, and all the evidence is completed and ready to be submitted to the Commission. Several hearings were held, at Fort Worth, Denver, at Chicago, and at St. Louis. Twenty thousand pages of evidence have been taken, and that evidence is now on file with the Commission, and it has taken not only days, but weeks, to hear that testimony in a case that involves annually an expenditure for advance in rates alone of \$3,000,000 for the cattle interests situated south of the north line of South Dakota and east of a common point in the State of Colorado—not \$3,000,000 at one time, but \$3,000,000 for each year.

Now, the question is, when we have challenged these advances, if the Commission shall find that they are not justified, shall that order be put into effect or shall we continue to pay what a body appointed by the law has said is an unjust and an unreasonable rate? The great danger which confronts this committee is in speedily undertaking to make a law without an efficient understanding of the present law and its operation and effect and the practice under it. When I say that it is a grave danger I speak deliberately, and I hope that the committee will consider that it is a matter of great importance to determine what rights the present law gives and what remedy the present law gives.

I will not be able in the time that I have to follow the consecutive order in which I have these things arranged here and state them section by section so as to say all that I wish to say, but I desire to call attention to the things which occur to me within the time that I have.

There is no basis for making a rate. That seems strange to the laity. It seems strange to persons who have not had experience in it, and some of the gentlemen were astonished at Mr. Bird's statement of yesterday that they could not fix a rate except upon competition, compromise, and, I believe, he finally said a guess. It is a guess. A rate on a particular commodity, so far as the matter of reasonableness is concerned, is a guess. It is a guess because it can never be known what profit it will produce. No man knows. I offer here an exhibit from the testimony of traffic men representing the Burlington, the Chicago and Northwestern, the Santa Fe, and some other lines to show the testimony that they have deliberately given upon cross-examination as to how they can fix a rate, and if they fix it upon the basis of the cost of the service. I asked Mr. Gardner, the general traffic manager of the Northwestern Railroad, in a case involving an advance in the grain rates between the Missouri River and Chicago, if he could tell what it costs to handle

a product like grain or live stock between the Missouri River and Chicago. He said he had been engaged in the business of handling freight for twenty years trying to ascertain that fact, and that he was no nearer a conclusion to-day than when he began. I concur with Mr. Bird exactly in that particular. I say that there is no basis for rate making, and those of you who may suppose that there is some peculiar knowledge in the mind of the traffic manager whereby he is able to make a rate, that he has a rule and a mathematical formula upon which he can fix a reasonable rate, are wrong, and I desire to disabuse your minds of that impression. I believe in no case before the Interstate Commission has there ever been a traffic man or any other railway official who has testified that he has any basis upon which to make rates. I take it to be a fact that the purpose of the railroads of this country is to earn money, just what I would do did I represent them, and just what you would do.

Therefore, carrying out the motive of making money, it is for the purpose of accepting what they must, as circumstances and conditions compel them, and taking all they can get, with the end in view of making the most money in the long run. I say that is an established fact, and I submit the testimony of principal traffic officials of western railroads to prove it. I have not time to go into this at length, but I will state that it is proven that it is demonstrable that that is true. That being so, it is no argument to say that when there is a dispute between the cattle raisers of the West and the railroads as to whether we shall pay \$20 a car more than we did in 1898, whether we shall pay \$20 a car more than we did for an average of ten years previous to that time, whether reasonable or not, it is a matter that can not be submitted to a commission. It must be submitted to somebody, else we must continue to pay the rate.

Now, who is to determine it? Every traffic man who has testified in that case, and possibly many of them have honestly believed it, has testified that the cattle rates are still too low, notwithstanding the advances which have been made. If so, may we expect that they will reduce them? May we leave it to them, to their tender mercies, to determine what we shall pay? I say that through the entire Southwest, including the territory in a line drawn along the southern border of Montana, and also largely among the shippers in Montana who ship from the South to that State, the universal opinion on the part of the cattlemen is that the freight rates are too high. Railroads have urged that they may be permitted to participate in the general prosperity of this country. They have urged that on that account they may be permitted to advance rates as prices go up. They have urged that in every hearing. When objections have been made to advances in making rates—in grain rates, in rates on class goods and commodities—they have testified that they advanced these rates in part because they believe they are entitled to participate in the general prosperity of the country. I will say that there is nothing to the theory; that it is a time-serving expression. But if there is anything in the theory they should at least share in the adversity when the adversity comes.

They have said that they did do that when prices were low and rates were low. I say if that be true, then the prices of cattle to-day, the impoverished condition of the cattle raisers and the feeders

through this broad land west of the Missouri River, call for the railroads to reduce their rates instead of advancing them. But they have not done it. Not only that, but they swear that their rates are already too low and that they would advance them were it not for the fact that some of the lines would not agree that it may be done. Undoubtedly that is true, and that is what is coming, and the people need a remedy more for what is coming than what is here. You may think lightly of this, gentlemen. Go to the West and investigate, and you will find that wherever the people have taken the matter up for consideration they have universally arrived at that conclusion. At every live-stock meeting that has been held where the subject has come up during the last four years resolutions have been passed asking Congress to pass a law empowering the Commission to fix reasonable rates; not that they wanted you to pass a law that will require carriers to haul traffic at less than a profit, but to the end that people might have a fair opportunity in the race for life—as the President says, for a “square deal.” The hope is that such bill as is turned out here will secure to the people that “square deal.”

There have been a great many things said in the newspapers and elsewhere, and there are expressions in some of the bills introduced here, and it is talked universally, about the railroads giving a bond to pay back to shippers. No more illusory thing was ever proposed. Gentlemen, in view of the existing law, the common law, in view of the existing remedies under the interstate-commerce act, it is perfect folly to talk about such a thing, absolutely so. What railroad company in this country is not solvent? Will you name one; can you name a single railroad company in this country that is not solvent to-day? Every one of the railroads in my country is solvent and good for every judgment that is rendered against it, and needs no surety and no security. The common law for a hundred years has said, as decided by the Supreme Court in the case of the Interstate Commerce Commission *v.* Texas and Pacific Railroad Company, that the railroads must provide fair, just, and reasonable rates; and in the Call Publishing Company case the Supreme Court held that a party has a right under the common law in a State court to recover judgment for an unjust discrimination or for an unreasonable rate charged.

Had you been aware, had you thought of the fact that that remedy exists complete to-day, as established by the Supreme Court of the United States, in every State court of this country having jurisdiction of the subject-matter? Have the shippers asked that a railroad company be made to give a bond? Have they? What shippers have requested that? If anyone has it is some man that is foolishly ignorant of the situation in this country or who is foolishly ignorant of the remedy provided by the common law, leaving out the question of the interstate-commerce act. In addition to that, the interstate-commerce act prohibits an unreasonable rate in the same manner as the common law. It prohibits an unjust, discriminatory rate, and according to the present decisions that is not materially different from what the common law provides, as decided in the Call Publishing Company case. It prevents undue preferences and advances. In other words, the common law intended that in transactions of the common carrier every person should have

a fair show to get what is reasonable and just and what everybody else gets.

In addition to the common law giving a remedy to recover in these cases (I have cited you a case where the Supreme Court has, in a comparatively recent decision, so held) the interstate-commerce act says I am entitled to recover for every damage and injury which may be done to me by any common carrier in violation of the provisions of that act, and that I have a right to go before any court and sue for that and recover it in any circuit court of the United States. What better remedy do you want than that? Why should there be a bond provided which may, perchance, compel a shipper in California to come to Washington for the purpose of prosecuting before the Interstate Commerce Commission a \$50 claim? Therefore, so far as the remedy is concerned with respect to recovery back of what is unlawfully paid, the law now provides the complete remedy for such recovery. And it is foolish to disturb that law.

Furthermore, the interstate-commerce act provides that the shipper may bring suit in the United States circuit court in the first instance to recover his damages, or he may file his claim before the Interstate Commerce Commission and have them hear the facts and let them say what reparation they shall recommend. And when they recommend reparation and the railroads are not a mind to pay it, then he can file suit in the circuit court of the United States and the findings of the Interstate Commerce Commission upon the facts are *prima facie* evidence thereof.

We have, in order to show that the rates on live stock are unreasonable from the Southwest, taken testimony that has cost the Cattle Raisers' Association and the Cattle Association of the West \$15,000. There are 20,000 pages of the testimony were it all written out. What shipper can undertake such an unequal contest; and any law that provides that he shall do it is but a pitfall and a snare that simply throws a sop to the public without any expectation that it can be subject to realization in furnishing an adequate remedy.

Therefore it is quite unimportant that the law shall provide, either the common law, the interstate-commerce act, or any law you may enact, that shippers may recover damages for the injury they have sustained.

Let me call your attention to the fact that a merchant situated in a little town east of a given commercial emporium in thousands of cases in this country must pay the rate of freight to the farther distant point and the local rate of freight back. I was told yesterday by a man from Nevada that when cattle are shipped from the country near Ogden, for example, into points in Nevada they must be shipped on to Sacramento and then back again to Nevada, in order to get that lower rate; and through that whole territory in the Rocky Mountains a rate of freight to a large extent is made from the eastern country as the rate to San Francisco plus the rate back. It is true that a rate of freight should not be fixed merely upon the basis of what division a railroad is expected to receive or on the lowest rate that it may be willing to make in competition with water transportation; but if they can afford to carry it at the cheaper rate it is quite evident that that is an admission that at least it is not carried at a loss. So you have at least that basis for determination.



I heard Mr. Bird speak of the grain rates yesterday. Do you know that it is a fact that people raising wheat around Wichita, Kans., pay as much freight to Kansas City, 228 miles, as the shipper in Kansas City pays to Chicago, 500 miles, and 2 cents more a hundred pounds? Do you know that it is a fact that the railroads ship from Kansas City to New Orleans and Galveston, 228 miles farther than Wichita, at 14 cents less than is charged from Wichita, Kans.? Do you know that it is a fact that wheat going to Liverpool and shipped from different points in Kansas must pay the local rate from that point to Kansas City, plus that part of the export rate back to Galveston over the same line? So that to-day from Wichita, Kans., 228 miles nearer Galveston, the rates of freight on wheat are 14 cents a hundred pounds more (if I am mistaken the tariff will correct me—I think it is either 14 cents or 14½ cents) than from Kansas City. I have those rates here before me. Now, if it is going as export, however, it is shipped at a rate almost twice as low as is paid by the local miller. There are thousands of those inequalities. I am not saying that they may not be justified. I am not saying that a commission may not find that circumstances justify them in many cases; but those conditions exist. I mentioned them for the purpose of calling your attention to the fact that the railroad company is no more capable of making a just rate to the public than is a commission which is just as well informed.

Now, the standards which the Supreme Court have marked out for reasonable rates have been laid down in several decisions. You must consider the fair value of the property, a fair return upon a fair value of the property; you must consider that you do not require the performance of a public service without due compensation; you must take into consideration the welfare of the public, the shippers, and the railways. You must take into consideration the cost of the service, the value of the service; and at last the courts have said that the best test of what a reasonable rate is is one that is established under free competition. Now, if that be so, I ask this committee if there is any test for reasonable rates to-day? Do you know of a rate that is established and fixed under free competition? They are not so established in our country. In December, 1898, the railroad lines serving southwestern territory met in St. Louis, at the office of the southwestern traffic committee, a committee to which all the southwestern lines belong, and they agreed among themselves—and I use the term advisedly—to raise the rates on live stock, and they did it, and they all published it on the same day. Now, they say that it was only a conference. What else does it amount to than an agreement? They conferred together for the purpose of bringing the thing about. Each one, they said, was acting independently. Be that true, they all acted to the same end, with the same means for each, and achieved it; and the exact results happened that each one expected would happen.

So, therefore, I say it is folly to talk about that not being an agreement. A little over a year from that time, in the early part of 1900, another advance was made in the rate. In 1903 another advance was made in the rate. And every one of them was made precisely in the same manner, and they have been maintained in the same manner. And there is to-day absolutely no competition with respect to the matter of rates in the transportation of live stock from the Southwest. That applies to class goods and commodities. For

more than ten years previous, for twelve years previous to March, 1903, there had been a fixed rate upon all class goods from St. Louis and all other points on the Mississippi River and east thereof to Texas common points, which includes Texas commercially. In March, 1903, the lines met, and after two or three days of parleying and consideration they advanced those rates from 7 to 20 per cent. Does that fix the standard of reasonableness? If so, then the Supreme Court is mistaken. I have cited in my statement a copy from the Supreme Court decision in the Joint Traffic case, in which it says if competition is not given free play such rate can not be used as the standard of reasonableness.

Now, I want to take up the subject with respect to who were injured in that case where these rates were advanced to common points. The rates were advanced on classes 1, 2, 3, 4, 5, A, B, C, D, and E, and a great number of commodities. There are three commodities that I recall on which the rates were not advanced. One was beer, another was vinegar, and the other was snuff. So I will not speak of those. But most of the other commodities were advanced, and all class rates. Gentlemen, who pays that? I suppose that amounts to more than a million dollars a year to the people of Texas. Somebody pays it. He who can name the price of his articles can always add the freight to that price. He always does do it. Mark that, gentlemen. Every trust in this country can name the price plus the freight for every article it sells. Every manufacturer who can name the price of his article can add the freight to it. So they do not suffer by it. It may be no wonder that they are not here.

The railroads desire to participate in the prosperity of the country, and they may say to the steel company "Seeing you are so prosperous we will participate in it, we will add something to the freight rate on steel rails." The steel trust says "Very well, it doesn't matter to us, we sell f. o. b.;" and so it is with respect to a great many commodities. Sugar, for example; tobacco, for example; agricultural implements, thousands of things that are produced in this country, the seller can fix the price and add the freight. The wholesaler undertakes to do that when he sells to the retailer, and the retailer undertakes to do it, if he can, when he sells to the public. The fluctuation in prices may load the freight off on the wholesaler in one instance, the jobber in another instance, or the retailer in another; but, as a rule, gentlemen, the consumer in the country pays it in little dribs as he pays the price for articles he buys. So it is with the man who produces wheat, corn, oats, cotton, live stock—and fattens them in the country—he can not fix the price of that which he sells, and therefore he must stand for the freight.

How much wisdom, then, is there in providing or undertaking to provide a method whereby the railroads, apparently undertaking to act fairly and pay back to the shipper that which he has lost, can never find the injured party? He will not be found in 75 per cent of the cases. There may be 25 per cent where you could fix it that a certain person was injured by paying the freight. Therefore, I say of the least consequence in this matter is your effort to provide that the railroads will make a recompense to whoever is injured. Take a merchant whose business has been destroyed. How can you pay him back for that? Not merely the rate of freight on

what he might have shipped! These things exist throughout the entire country. You may believe it, they are not able to pay money to come here before you; they can not come here and pay hotel bills and their expenses; they can only send their representatives. If you desired it I could have a hundred cattlemen here from all over the Western country who would like to be heard. Mr. Mackenzie is here and if you wish to ask him any questions, he represents one of the largest ranches in this country, and he has come here with me to present our side of the case. If you want to hear him he is here. The fact that they do not appear is of no significance, except to show that they are not able to appear and that they have to depend on their Congressmen to represent them in respect to these matters.

In the matters which I have presented here I have reviewed the interstate-commerce act section by section and stated what each provides. I have undertaken to take up almost every subject that, in my opinion, should be considered, and I will ask that if it is printed the members of the committee, if they see fit, will look it over, and they may find some matters of interest in it.

It has been said that because the rate per ton per mile has generally decreased, therefore there has been a tendency downward in rates. Gentlemen, that is not so in my country. There is an exact method of determining whether the rates have declined or not. Go to the files of the tariffs in the Interstate Commerce office and see if rates have declined on live stock, if they have declined on wheat, if they have declined on corn, if they have declined on coal, if they have declined on lumber, if they have declined on hay. Have they declined on fruits and vegetables? Name one of them, gentlemen, on which the rates of freight in the Western country have declined. Yet how silly it seems for men to come here and undertake to show you that rates have declined because the rate per ton per mile has declined.

That is a perfect fallacy. No man undertakes to make a rate on a basis of a rate per ton per mile. The aggregate rates per ton per mile upon an aggregate of all freight is a mere curiosity in figures and of no practical importance. While the rate per ton per mile on a given commodity may have declined, the rate per ton per mile on wheat, the rate per ton per mile on grain, on hogs, and cattle, and especially on the classes throughout this Southwestern country, instead of having declined, have increased in every instance; it has increased on those great commodities that furnish the railroad companies their support in that entire country. And yet I have no doubt the rate per ton per mile for the aggregate of freight shows a decrease. And why? Because the increase in the amount of freight in the way of lime, sand, brick, castings, machinery, stone, and a thousand and one heavy articles that take a low rate of freight and a heavy car loading has been very great, and therefore when you ascertain the rate per ton per mile by dividing the total mile tonnage through the total receipts you can see what an enormous amount this low-rate freight will be.

I have had made out, and it has cost me \$10, a statement showing what the comparative tonnage has been on six important lines in the West since 1898, extending down to the present time. The total tonnage has increased 40 per cent. So that whatever prosperity the rail-

roads are entitled to participate in should be limited to the increase in the volume of traffic. That will always be automatic, and when a country is prosperous the shipments will be more frequent, and when the country is less prosperous the shipments will be less frequent. It will be automatic. But they should not be permitted simply from the love of money to reach down into the pockets of the people and levy a rate of freight whenever they please and where they please and take away a large part of the profits which the producers of this country are justly entitled to.

Now, another thing. Let us come to the cost of supplies and material. There have been a lot of statements made and published—statements in the newspapers, statements before this committee—in regard to such a great increase in the cost of supplies, material, and labor. In trying the case with respect to advances from common-point rates from St. Louis, it being the basing point, and therefore from all other eastern points to Texas, we took occasion to take exact testimony upon that subject, and we called such men as the vice-president and the superintendent of the St. Louis Car and Foundry Company; Mr. Nixon, the purchasing agent of the Missouri Pacific Railroad; Mr. Thompson, engineer of the Texas railroad commission, and the tie and timber agent of the Missouri and Pacific line, and we got exact testimony on the subject instead of resting it on the proposition that it has advanced such and such a per cent. I heard one railroad man testify that lumber had advanced 70 per cent. That is entirely a mistake. He did not know a thing about it. He simply had heard somebody say that. The largest, heaviest timbers have advanced, but ordinary lumber has advanced very little at the mills in Texas and Arkansas and Louisiana. These gentlemen have selected the lowest point of prices. They have not taken an average for twelve or fifteen years. They have selected the lowest point. Do you know whether or not wages are higher to-day than they were in 1892? Do you know, have you made any effort to ascertain, whether it is a fact or not?

Every railroad company files its annual report, in which is stated the number of days worked and the amount that is paid to every different class of employee. In here we have a table, in the brief that I am submitting as a part of my statement here, that shows a table of the rate of wages that is paid by the Missouri, Kansas and Texas Company, the St. Louis Southwestern Company, the St. Louis and San Francisco Company, the Missouri Pacific Company, the Texas and Pacific Company, the St. Louis, Iron Mountain and Southern Company, the International and Great Northern Company, the Atchison, Topeka and Santa Fe Company, the Gulf, Colorado and Santa Fe Company, the Chicago, Rock Island and Pacific Company, and the Chicago, Rock Island and Texas Company, for all their different classes of employees, for general officers, general office clerks, station agents, other stationmen, enginemen, firemen, conductors, other trainmen, machinists, carpenters, other shopmen, section foremen, other trackmen, switchmen, flagmen and watchmen, and telegraph operators and dispatchers. You can see by this table the exact average of the day's work from 1892 down to the present day. That is the way to ascertain these facts; the way is to get at the facts and not take general statements for them.

Now, again, copied in this brief is the testimony of such men as I have mentioned with respect to the cost of supplies and materials, naming the articles, naming the prices and what they cost and what articles they use, and you can see what the truth is in regard to that matter.

Also, we show in these tables that to-day a dollar expended for labor pulls more tonnage, earns more money, than it ever did in the history of railroad operation in this country. A dollar expended for coal to-day earns more money and draws more traffic than ever before. There has been also a great increase in the density of traffic on these railroads, and we have a table showing that. So that the economies introduced by reason of the heavier car loading, by reason of the heavier train loading, the greater density of traffic per mile have more than offset all of the expense that has been added to the railroads by reason of the increase in the cost of labor and material. This is all plainly demonstrated by this brief which I have here, which I will make a part of my remarks, and these facts are practically undisputed. I have heard the mistaken statement made by gentlemen—gentlemen who are no doubt honestly mistaken, and who believe what they have said—that the cost of repairs to cars by reason of the safety appliances required has increased wonderfully.

I have taken occasion to have made out a statement which shows the cost per mile of line and the outside cost of the repairs and renewal of cars, locomotives, and every other item (fifty-odd items in all) of expense of railroad operation. If you want to see it you will have it here. It does not cost as much to-day by considerable per ton per mile hauled for repairs as it did in 1893, notwithstanding the supposition of some of these gentlemen to the contrary. In this case we took evidence in respect to the actual valuation of these railroads, and taking their earnings, we show what per cent they have earned upon the actual value of the property, plus the additions that have been made since they were valued. There are a great number of matters of importance embraced in this that if the committee desires to know about, or if the committee desires some of the material facts with respect to railroad operation—the cost of supplies and materials and labor, the amount of stocks and bonds per mile of road, and the amount of earnings, gross and net, per mile—you will be able to find the facts set forth in this brief.

Now, another thing: That the combination of railroads which advanced the rate to Texas did not stop with the railroads. I offer a statement from Mr. Haile, the traffic manager of the Missouri, Kansas and Texas Railroad, that they could not advance the rates unless the steamship lines from New York agreed to it. Texas is far more favorably situated for interstate rates than any of these interior States away from water transportation. But they went to New York and engaged with the steamship companies to advance the rate, and they did. That was the result, and it was all put into effect at the same time. You, who have not investigated it, do not know the extent to which the railway companies of this country, in their desire to make money, have combined for the purpose, not of making rebates, not of making discriminations, but of unreasonably advancing the rates to the people of this country. The railroads are greatly interested in having no rebates. The railroads are interested in

having no discriminations. It is the people who pay the freight, the producer and the consumer, who are interested in having a reasonable amount only to pay.

Much has been said in regard to rebates. The newspapers are in favor of stopping rebates. For whose benefit? For the benefit of the railroads. It will save them millions of dollars. Mind you, I do not believe in rebates. I think everybody ought to have a square deal in the race for life. But unless some law which will not only prohibit rebates and discriminations, but also unreasonable rates, is enacted, there can be no fair deal in the race of life in this country.

When the railroads desired to raise the rates on grain from Kansas and Nebraska, what did they do? They made an advance of a differential in the proportionate rate between the Missouri River and points in these Eastern States of 2 cents per hundred pounds, and that had the effect of advancing the rate 2 cents per hundred pounds on every bushel of grain raised in Kansas and Nebraska. What else did they do? They could not have done that unless they had raised the rate to New Orleans and Galveston at the same time, which they did. This Commission instituted an investigation into that at once. Why? Not because the farmers complained, not because they came forward and protested against it, because they probably did not have the means to do that, and perhaps did not know about the course to pursue; but because the Commission deemed it just and right that such an increase in rates should be investigated. It was an increase in rates to a higher point than had been actually charged in a great number of years. It simply needs a careful, painstaking investigation into the actual facts, gentlemen, to convince you what your duty is and how it ought to be performed.

I have seen in several bills the statement—and I think it has been put in honestly, I am not criticising men, I am talking about measures; I am not criticising railroad officials either, I am simply talking about measures; it is the standard that they fix that I object to—that the interstate-commerce court may pass upon the reasonableness of the Commission's orders. I have no doubt that the gentlemen who have appeared here and made statements in regard to this matter have honestly believed that what they advocate is wise, and I say again I am not criticising any of these gentlemen or criticising any of these railroad officials; if I were in their place I would do what they are doing, and so would you. But is that right for the public? They are looking out for their interests, and they move in mysterious ways their wonders to perform, but they generally perform the wonders. As I have said, I have seen in some of the bills introduced here—I have no doubt it is put in in perfect honesty, put in with the belief that it ought to be in; but I warn this committee against it—that the interstate-commerce court may pass upon the reasonableness of the Commission's orders. I say that you might as well not enact any laws; I say that when you do that you absolutely destroy the effectiveness of any law; because if the court is to substitute its judgment for what is reasonable and the Commission shall have found that a rate is too high by 1 cent a hundred, may not the court arrive at a different conclusion as to reasonableness and thus substitute its own judgment for that of the Commission? Having done so, what would be the result? The court, under the

law, could not fix a rate for the future. It will be destructive of the Commission's power and yet not constructive of anything in lieu thereof.

I am giving you warning about that because I fear it is so. I know it is not so intended. I know it is put in there with honest intent and the belief that the court ought to pass on the reasonableness of the Commission's findings. It will never do to do it. Let the court pass on the lawfulness of the Commission's findings, and then if the Commission shall not have pursued its methods according to the law creating it the court will set its findings aside. If it has taken private property without due process of law it will set its findings aside; if it has required the performance of public service without just compensation it will set its findings aside. Why? Because those things are violative of the Constitution. But if you substitute the judgment of the court for the judgment of the Commission on the facts you absolutely destroy the effectiveness of the legislative body fixing a rate for the people.

I ask careful consideration by the committee of that and I believe you will honestly give it.

I say another thing: That every inquiry in regard to a rate should be prosecuted by the Government. Are you going to require a citizen to undertake the herculean task of filing a complaint and carrying on the prosecution of it? In the first place, he must incur the enmity of the railroads with which he does business by such a procedure. Thousands of people can not afford that; they can not undertake the task of litigating with a half-dozen railroads; they have not the money to pay lawyers' fees or the expenses. Therefore any remedy which falls short of putting it to the Government to determine, first, whether the complaint is justifiable, whether it is probably a correct one, and, second, if it is, to prosecute that complaint, will be no remedy at all to the people. Mark it; that is the way it will turn out.

To-day it is said that no complaint is made of unreasonable rates, and there are very few. Why? Simply because no man feels that his interest is so great that he can undertake it. Yet in the aggregate there are millions of men who feel that they have cause for complaint. It so happens that with the cattlemen they are organized sufficiently to undertake it. That is the principal case of challenging the reasonableness of rate that I know of in the whole broad territory of our southwestern country. Coal rates were taken up by a coal and gas company at Denison, and the Commission held that those rates were unreasonable, and the railroad reduced them. The butchers of New Orleans said that it was wrong that the Texas and Pacific Railroad should charge \$15 more for 10 cars than it did for one car (\$15 more per car). The Commission heard that case and decided against the road. And Mr. Bird, representing the Texas and Pacific Railroad, as I suppose—it is simply a guess on my part—said that that was proper.

Any complaint submitted to the Commission should be first investigated and determined whether or not it is a proper complaint, whether it is reasonable, and if the Commission believes it is, then let the Commission use its own judgment to investigate the subject, but at Government expense and not at the expense of those poor shippers, who can not afford to incur the costs incident to carrying the matter on. I say that the Commission should determine the facts. It is

perfectly inconsistent with a legislative body—not itself determining the facts upon which it acts, and therefore it is consistent that any court shall return the reasons upon which they base it, providing they are constitutional and do not take private property without just compensation.

**The CHAIRMAN.** You have now occupied forty-five minutes.

**Mr. COWAN.** I thank you, Mr. Chairman and gentlemen, for your patience, and I ask that I may file this brief as a part of what I have said.

**The CHAIRMAN.** I wish you would mark those parts that you particularly desire.

**Mr. COWAN.** I have only incorporated in this brief matters that I believe are of considerable importance to every member of the committee.

**Mr. BURKE.** Have you the tables you referred to in your brief?

**Mr. COWAN.** Yes, sir.

**The CHAIRMAN.** Very well, you may file that.

**Mr. Cowan** filed the additional argument.

#### STATEMENT OF MR. MURDO MACKENZIE.

**Mr. Chairman and gentlemen of the committee:** I represent probably 80 per cent of the cattle growers of the West. I am not able to lay the matter before you in such a lucid manner as Mr. Cowan has done, but in a few sentences I am able to explain to you our grievances.

For some time past we have felt that the railroads have been discriminating against the section of the country from where I come. Up to 1898 we paid per car from Texas to the Northwest from \$55 to \$65 per car. After that they advanced the rate from \$65 to \$70, and to-day we are paying \$100 a car. We feel this: That if the railroad companies were in a position to pay their expenses at \$65 a car and make a little profit—or even if they did not make any profit at that rate—that the difference between \$65 a car and \$100 a car is too much. We feel, furthermore, upon investigation, that the cost to the railroad is not as much as it was then. It is not as much for this reason: They load us down with tonnage; they do not give us the same service. They had in vogue what they call the tonnage system. They tell us now that they have done away with that system, but that is not a fact.

I know from experience that they have not done away with it. Up to 1897 I could go to a railroad company and tell them that I would give them from 10 to 12 cars on a train and they would give me a special train. But now they will not move my freight unless they get the full tonnage of a train, the full tonnage that the engine is rated to carry. In many instances they overrate their engines, so that they will not make more than from 7 to 10 miles an hour. I have had shipments on the road—I have had from 3,000 to 5,000 cattle on the road and I have got a service of from 7 to 10 miles per hour.

Now, gentlemen, it would be impossible for me to tell you or explain to you the losses we entail unless you are cattlemen. In fact, I do not know about it myself; I am like Mr. Bird—I do not know how these things are arrived at, but I know the loss to us is enormous. The railroads have failed to give us service; they treat us as they



please, and we want to be protected. We do not want you gentlemen to feel that we came here asking for a club to break the backs of the railroads. We want protection. We want to feel that we have a board of arbitration between the shipper and the railroads. We want to feel that if we are paying \$100 a car the Commission will tell us that that is an unreasonable rate. If the Commission would tell us that that is a reasonable rate we bend to their decision; we are willing to pay it.

But we feel, gentlemen, that it is not a reasonable rate. We feel that the railroads were giving us a rate of \$65 from the Southwest to the Northwest, and to-day they are charging us \$100 per car. We feel, furthermore, that the railroads at one time charged us \$65 a car from Texas to Kansas City. What do they charge to-day? They charge us 34½ cents on a minimum of 22,000 pounds. They have changed the rate from the carload rate to the cents per hundred. They made the minimum 22,000 pounds, making us believe that they were using the divisor to give us the same rate as we had before; but if you take those figures you will find that in every instance instead of giving the rate we were paying before we are paying from \$10 to \$20 more. They thought they could make the cattlemen believe that they were getting the same rate, but it is not a fact that we are getting the same rate. Every man who ships cattle from the Southwest to the markets can tell you that he is paying to-day from \$18 to \$25 per car more than he did in 1896 to 1898. That, together with the service we are receiving, is more than we can stand, and if this condition of affairs will continue it is going to knock us out of the business.

Now, gentlemen, we do not feel that that should be the case. We feel that you are here to give us justice; we feel that you are here to do what is right by us; we feel that that is your intention, and all that we ask of you is to give an Interstate Commerce Commission the power to do this one thing: That they shall have the right under the law to correct any inequalities which exist.

Now, I can point out a case to you where we have to pay for the same service 6½ cents per hundred more than our neighbors in Colorado pay. In the point in Texas where I live I am 550 miles from market. Las Animas, Colo., is 550 miles. My cattle friend from Colorado has to pay 28½ cents per hundred and I have to pay 34½ cents a hundred. We can show the railroads, I think, by figures, that it does not cost them 1 cent more to carry our cattle than it does to carry the cattle of the man who lives in Colorado. Some years ago we had a meeting with traffic managers in St. Louis. Mr. Cowan has already referred to that meeting in his statement before this committee. We pointed out this inequality in the rates at that meeting, and we asked them to correct it. They admitted that we were right, but they told us that in order to put us on a more equal footing with the men in Colorado that they would raise the Colorado rate, which they promptly did.

Now, that is the way the railroads have, gentlemen, of correcting rates. They were perfectly satisfied with the rate they were getting from Colorado until we complained. When we made a complaint then they came forward and said, "We will equalize the rate by raising the other man's rate." Now, we do not think that is right; we do not think it is fair; in fact, we feel that it is very unfair, and we

ask you gentlemen here to prepare such a bill, and report it, as will give us protection under the law—that we may have a place to go where we know we will get justice.

I do not blame the railroad men: I have friends among them. I think that probably I would do as they do if I were in their position, and, on the other hand, they would probably feel very much as I do if they were in my place. I am satisfied when you look this matter over and consider it very fully that you will see that the cattlemen and the industries in the Southwest require your protection. We come to you hoping that we will get it, and we are satisfied that before you are through you will give us what we want. I thank you, Mr. Chairman and gentlemen.

The CHAIRMAN. There is a gentleman here from the New Orleans Board of Trade, Mr. Robinson, and we will now be glad to hear him.

**STATEMENT OF MR. C. W. ROBINSON, REPRESENTING THE NEW ORLEANS BOARD OF TRADE.**

Mr. ROBINSON. Mr. Chairman and gentlemen, I represent before you the New Orleans Board of Trade. I am an untrained speaker; in fact, I think in twenty-five years this is only about the third time I have attempted to express my ideas while on my feet. By the courtesy of your chairman I am entitled to ten or fifteen minutes to lay before you some thought on this question.

I have sat here day after day and listened to the railroad men, and I submit that they have fully demonstrated one or two propositions. First, they have demonstrated that they are in favor of a fair regulation provided they are allowed to say what is fair.

Our contention is that an impartial commission shall be empowered to say what is a fair and reasonable rate.

Second, they have stated very clearly and demonstrated, I think, that they do not know and can not tell you how rates, how tariffs, are made. For twenty-five years, directly and indirectly, as a manufacturer and as a banker, I have been brought into contact with traffic managers, with rate makers, and I believe that I know how they make rates. The first principle on which they base rate making is the Robin Hood principle of what will the traffic bear? Illustrative of this principle is the question of grain rates from Chicago to the Atlantic seaboard. In the winter, when water competition has ceased to exist because of the closing of the water routes, they take what the traffic will bear. In summer time, when they must compete with the water routes, they take what the traffic will allow them to take. The manufacturers of yellow pine in the district covered by the Carolinas, Georgia, Mississippi, Louisiana, and Arkansas protested against a raise in lumber rates to the Central West, to all points north of Iowa, to all points in the Middle and Eastern States, to all points, practically, in which yellow-pine lumber was sold, a raise of \$8 per ton. At a hearing held in Atlanta, Mr. Culp, traffic manager of the Southern Railroad, was on the stand. He was asked to explain why this raise of rates on lumber was made. As nearly as I can remember his exact language, it was this: The railroad companies, desiring to share in the general prosperity of the country, looked around to see who could stand an advance in rates. In their judgment—mark you, in their

judgment—the manufacturers of lumber in the Southern States were prosperous and could stand a raise in rates. Therefore they raised the rates.

I heard a great deal about injunctions. I wish first, in passing, Mr. Chairman, to say that after listening to the clamor about injunctions we endeavored to get injunctions; we tried two judges of the United States court—one in Georgia and one in Mississippi—and they both refused us injunctions on the ground that they had no jurisdiction. Congress in its wisdom, gentlemen, sought to protect the producer of sugar in this country. They put a duty on imported sugar. The railroad traffic managers, in their wisdom, to an extent nullified this action of Congress, in that they raised the classification of domestic sugars, changing it from the fifth to sixth class, thus raising the rate on domestic sugar about 30 per cent, and at the same time they gave to imported sugar the lower rate of freight. I take it for granted that you are all familiar with that case and what the Supreme Court said about it.

Another proposition that the railroad people have demonstrated is that they have a good thing and they do not want to be interfered with. I can best illustrate this position by the story of the cow. Two negroes in Mississippi bought a cow in partnership. The elderly negro led the cow to his home and commenced at once industriously to milk her. This process went on for a week or more, when the younger negro came around to inquire as to his rights in the premises. The older negro grew very indignant. He said: "My having possession of the cow for all this time, I have vested rights, and for you to come here now and interfere with my milking would be a great outrage and clearly unconstitutional." This is the position the railroad people take. They have practically admitted to this committee that rates have been raised in a good many instances; that in some few instances they have been reduced. But the milking still goes on, and the manufacturers, the farmers, all over the country are feeding the cow, while these people are doing the milking. Now, we do not ask that the process be reversed, that we be allowed to do the milking, but we ask that a fair division be allowed us, and by a tribunal that is impartial.

I think there is a mistaken idea, as Mr. Cowan has said, as to what the people want, as to what they are clamoring for. All this talk about the stopping of rebates is all true. We want them stopped. The railroads want them stopped. Everybody wants them stopped. But we do claim and we do believe, and we are sincere about it, that the railroads are getting an unjust share for transporting our manufactured products and our agricultural products. Since I have been here I have heard with a great deal of surprise from the traffic managers that rates have been reduced. Well, people generally do not understand it that way. If you go to the manufacturer of lumber in the Southern States and tell him that his rate has been reduced, when he knows that every day he is paying \$8 more per ton than he did six years ago, you would have a very hard time to convince him that rates have been lowered. You would have a difficult time in making him see that.

You have heard a great deal, too, gentlemen, about the vast number of people who are dependent on the prosperity of the railroads. It is true a vast number of people are dependent on the prosperity of

the railroads; but we have about 90,000,000 population in our country now, and I dare say that no more than one-fifth of them are dependent either directly or indirectly on the prosperity of the railroads for their livelihood and their own prosperity. Now, is it your duty to legislate for that one-fifth or for the four-fifths? Is it not your duty to so legislate that the greatest good will come to the greatest number?

It is true that incidentally every citizen of the United States is interested in the prosperity of the railroads. It is equally true that every citizen of the United States is interested in the prosperity of the agriculturists, in the prosperity of the manufacturers, and only in that limited sense are the four-fifths interested in the prosperity of the railroads of the country.

Gentlemen, in conclusion, justice to the transportation companies demands such rates as will enable them to earn fair and proper returns on their actual investment, laid so as not to destroy natural advantages. No true American would deprive them of such rates. Let it be remembered, however, that the managers of transportation are human and are greedy, like other humans, and unless some power be interposed to change and regulate their natural greed, oppressive and discriminating and exorbitant rates are a necessity.

Gentlemen, I thank you for your attention.

Mr. BACON. Have you not misstated your figures in one respect? You said \$8 a ton, and I think you meant \$0.80 a ton in one place in your statement.

Mr. ROBINSON. Yes, sir; you are correct.

(Thereupon, at 12 o'clock, the committee went into executive session.)

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**STATEMENT OF S. H. COWAN, REPRESENTING THE CATTLE RAISERS' ASSOCIATION OF TEXAS AND OTHER WESTERN CATTLE ASSOCIATIONS.**

*To the Chairman and Members of the Interstate Commerce Committee of the House of Representatives, Fifty-eighth Congress.*

GENTLEMEN: I was employed by the cattle interests to come here to Washington to place before you such facts as will be important and sustain the position of the cattle interests of the entire West—namely, that a reasonable, speedy, adequate, and inexpensive remedy be provided for the regulation of rates of freight on interstate transportation of live stock as between points in the Western States and the respective markets.

I have had several years' experience and practice in various ways with respect to the matter of rates in interstate transportation of live stock, and have represented the Texas Cattle Raisers' Association and the Cattle Growers' Interstate Executive Committee in the matter, carrying on for them a prosecution before the Interstate Commerce Commission, involving the reasonableness of advances which have been made in the southwestern rates and the terminal charge of \$2 per car on all carloads of live stock delivered at Chicago, in the course of which investigation it has been my province to ascertain something with respect to the matter of rates and the manner in which they are made, and railroad service.

Preliminary to what I shall say I pause to remark that hundreds of them could be brought here to present their claims before you did they deem it advisable or desirable. Other shippers in many instances are not as well organized, and I beg of this committee not to consider the fact that because shippers are not here to appear before it in any great number it indicates that they do not desire action on the part of Congress. They have not the means nor the facilities to come themselves or be represented by counsel. They place their confidence in their Congressmen, and they feel themselves as much unequal to the task of making an equal fight with the railroads before this committee as they do in the courts.

#### ADVANCES IN RATES.

It is a fact that the rates from most points in Texas have been advanced since 1898 an average of \$17.50 to \$20 per car, and they are to-day higher than they have been at any time since rates were filed with the Interstate Commerce Commission. It is also a fact that during the time these rates have been advanced the quality and value of the service has been deteriorated. It takes a longer time to reach the markets or any other destination, with a consequent material loss to the shipper, and this has occasioned general complaint. These advances have likewise applied to the Indian Territory, Oklahoma, New Mexico, Arizona, and from most points in eastern Colorado, western Nebraska, and western Kansas, parts of Wyoming and South Dakota, though the advances in the rates have not been as great from all points in such States as in the State of Texas.

I believe that it is safe to say that the rates of freight based on the present tonnage cost the live-stock shippers of the States named \$3,000,000 per annum more to-day than would the rates of freight in effect in the year 1898 and the average rates collected for the period of ten years next preceding 1898.

Not only have the live-stock rates been advanced, but in March, 1903, an advance of from 7 to 20 per cent was made on practically all class goods and commodities, with a few exceptions, from points on the Mississippi River and east thereof to the State of Texas. Space forbids a tabulation of the various rates, but you are referred to the files of tariffs with the Interstate Commerce Commission to prove the facts stated. They are not denied.

#### COMBINATION OF RAILWAYS.

I assert it to be a fact that it is proven by the testimony of the traffic managers of the southwestern lines that these advances were made by a combination of the carriers through their respective traffic managers or freight agents having charge of the matter of advancing rates. No such advances could have been made without an agreement or that which is equivalent to an agreement, and while the traffic agents denied that they had come to any agreement they admitted that they conferred together and all pursued the same object by the same means, each performing the very part of the transaction which all the others expected they would, and published and put into effect and maintained these advanced rates by reason of that combination. This

applies to the rates on live stock as well as to the other rates named. Lumber and grain rates have been advanced by the same method. Such reductions as have been made have been brought about by the motive of making money, and not by a disposition on the part of the carriers to make a lower rate, and on that ground they have put in lower rates in order to move traffic when otherwise it would not have moved.

In proof of the fact that the rates are higher in the Southwest than for many years, and that the same has been effected by a combination of the railroads themselves and the steamship companies carrying freight from New York to Galveston, I attach hereto, as Exhibit No. 1, the testimony of Mr. Haile, traffic manager of the Missouri, Kansas and Texas Railway Company, taken before the Interstate Commerce Commission.

#### INCREASE IN VOLUME OF TRAFFIC.

In the same period in which these advances in rates have been made the total tonnage as well as the passenger traffic on the southwestern lines has increased an average of 40 per cent. As an example, herewith find appended a table showing the advances of certain representative lines selected at random. An examination of the annual reports of other lines will show the same thing.

*Table showing the number of tons of freight handled and the number of tons carried 1 mile per mile of road for years ending June 30, 1898 and 1904.*

| Road.                                 | Total tonnage. |            | Increased. | Tons carried 1 mile per mile of line. |         |
|---------------------------------------|----------------|------------|------------|---------------------------------------|---------|
|                                       | 1898.          | 1904.      |            | 1898.                                 | 1904.   |
| Texas and Pacific                     | 2,470,765      | 3,631,316  | Per cent.  | 381,447                               | 419,978 |
| St. Louis, Iron Mountain and Southern | 4,596,071      | 7,719,627  | 69         | 639,542                               | 884,368 |
| Missouri, Kansas and Texas            | 3,568,825      | 5,204,103  | 46         | 473,691                               | 426,431 |
| Atchison, Topeka and Santa Fe         | 6,839,657      | 9,513,801  | 40         | 430,664                               | 589,216 |
| Chicago, Milwaukee and St. Paul       | 14,230,742     | 21,267,370 | 50         | 423,413                               | 561,676 |
| Union Pacific                         | 4,518,923      | 6,645,698  | 41         | 718,891                               | 835,727 |

NOTE.—Union Pacific tonnage for 1898 was greater than any year up to 1904. For example, 1899 tonnage per mile of line was 575,325.

A large amount of this increased tonnage has been from heavy articles like cement, lime, brick, castings and machinery, lumber, coal, stone, ores, and the like, all of which classes of freight take a lower rate per ton per mile than most of the agricultural products, manufactured articles, and merchandise. The result is that the rate per ton per mile may show a decrease, and yet every rate in the schedule may, in fact, have been advanced. Let no one be misled by paying any attention to the rate per ton per mile as applied to all traffic as a whole. I state it as a fact that the rate per ton per mile has advanced on live stock throughout the Southwest; that it has advanced on merchandise coming into Texas, if you apply the equation to each particular commodity, though, by reason of the extraordinary amount of low-class freight, if you average all commodities it may show a reduction, but it is entirely unimportant. The railroad which handles 1,000,000 tons of coal may handle 100,000

tons of merchandise, and an advance of 10 per cent advances the tonnage 110,000 tons, but the low-class tonnage advance is really ten times as great as the other, though the percentage of the advance is the same.

#### PARTICIPATING IN GENERAL PROSPERITY.

The railroads have claimed the right to participate in the general prosperity of the country. This they have done by the advance in the volume of traffic, and should not be permitted to do by simply levying a tax upon the public at their will, which they may do so long as they are in combination together. The southwestern lines, operating in the country where my clients do business, are in combination with respect to the matter of rates, and competition in rates has been eliminated. For example, in December, 1898, the same rate of freight existed precisely on every line of road which competed for the same business from the same points of origin to the same points of destination. The southwestern lines at that time advanced the rates on live stock in exactly the same manner, publishing their rates and putting them in effect on exactly the same day. The same thing was repeated in January, 1900, and again in March, 1903, and they all testify that the rates are still too low, and the obstacle to advancing them still further lies in the fact that some one of them will not consent to it. Space forbids a recital of the testimony on the subject.

#### UNREASONABLENESS OF RATES.

It has been asserted by the railroads at hearings that the most material matter is the relative adjustment of rates and the prevention of discrimination and preferences by rebates or otherwise. To the railroads these are by far the most material. As applied between communities of merchants situated in different cities it may be the most material question. Merchants are not so much concerned in what the rate is as in the relative adjustment of it. But when you come to consider that great body of the people, the producers and the consumers, the most material question to them is how much they shall pay. The manufacturer adds the freight to the price of his goods. The wholesaler or commission merchant adds the freight to the price at which he sells to the shipper or the retailer. The retailer advances his invoice by the amount of the freight, and at last the consumer pays it. But the great body of farmers who are producers in this country, who can not add the freight to the price of what they sell because they can not dictate the price, must always stand the freight. So, therefore, to them the most important question is that of the unreasonableness or reasonableness of the rate.

Since the railroads make a profit, as they have by the prevention of rebates and the elimination of competition, that profit can only be gained through the amount of the freight charged for transportation. It has been proven in the case of the Texas Cattle Raisers' Association against the southwestern lines, involving the reasonableness of the advances in live stock rates above mentioned, that during the period of time when the rates were adjusted upon a reasonable and satisfactory basis, previous to these advances, for years the southwestern

lines customarily paid rebates to get the business. It was deemed sufficiently profitable in that competition with each other to purchase it. Who got the benefit of that? Undoubtedly the shippers. Who received the benefit by the stopping of rebates? Undoubtedly the railroads. Is it any wonder, then, that they, with one accord, desired to prevent rebates?

With rebates eliminated and with published rates maintained as they are, and should be, competition is, as it must be, eliminated, whatever the theory of the law was with respect thereto. The factors which the Supreme Court of the United States held to be those on which the reasonableness of a rate must be determined and which must be considered by the Commission or any other tribunal deciding the fact of reasonableness are:

First. "That the circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies and of producers and shippers and of consumers should be considered by the tribunal appointed to carry into effect and enforce the provisions of the act." (*T. & P. Ry. Co. v. I. C. C.*, 162 U. S., 197.) And in the Nebraska rate case the Supreme Court said:

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation must be the fair value of the property being used by it for the convenience of the public, and in order to ascertain that value the amount and market value of its stocks and bonds, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

And again:

It can not, therefore, be admitted that a railroad corporation, maintaining a highway under authority of the State, may fix its rates with a view solely to its own interest and ignore the rights of the public; but the rights of the public would be ignored if the rates for the transportation of persons or property used for the public or the fair value of services rendered, but in order simply that the corporation may meet operating expenses, pay interest on its obligations, and declare a dividend to stockholders.

If a railroad corporation had bonded its property to an amount which far exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may reasonably be charged.

And in the case first cited the Supreme Court has firmly established it that the question of reasonableness is one of fact. In the nature of things it could not be otherwise. Hence, the province of the court should not extend to any question of reasonableness, as that would destroy the act.

RAILROAD COMPANIES DO NOT UNDERTAKE TO MAKE REASONABLE RATES.

I state it as a fact, demonstrable by the evidence of every traffic officer who has been examined by the Interstate Commerce Commission, that there is no basis for rate making. No better proof could



be made than is found in the files of the tariffs showing the actual rates which have been in existence on various lines of railroad, as they have fluctuated up and down, which fluctuations and comparisons of rates on various lines on various commodities conclusively prove the want of any standard.

I therefore assert that railroads have no basis, theory, or practice to fix reasonable rates; they accept what they must and take all they can consistently with the effort of making the most money in the long run.

As proof of this fact I attach hereto, as Exhibit No. 2, the testimony of traffic officials of several of the southwestern lines, whose names will be found in connection with the exhibit.

#### COST OF SERVICE UNKNOWN QUANTITY.

Undoubtedly one of the most material elements with respect to the reasonableness of rates charged for railway transportation is the cost of performing the service. Anyone is entitled to ask the railroad company to perform the service, but no one is entitled to ask it to perform the service without profit. But if the railroad company performing the service can not tell you what it costs to perform the service, upon what ground can it be contended that it has a superior knowledge in determining what the charge should be? I assert it to be a fact that when questioned upon that subject all of the traffic men of the country admit, as Mr. Bird, vice-president of the Gould lines admitted before this committee, that they can not tell the cost of the service of transporting a given commodity or a given train-load of commodities between any two points. In proof of this fact I refer you to Exhibit No. 2, wherein you will observe that the traffic representatives of the various southwestern lines have frankly so testified.

Furthermore, it is fully shown in their testimony that none of them consider any of the elements which the Supreme Court has stated constitute the standard of reasonableness.

The inquiry naturally would be, How is the question of reasonableness to be determined by anybody, whether a Commissioner or a traffic man? The answer is that the present rate adjustment of the country, or up to the time when the companies entered into combinations among themselves to fix rates by agreement or conference, that it is a matter of evolution. Every imaginable circumstance surrounding the building and the operation of railroads, the construction and putting into operation of new lines, competition between each other, between markets, the economies in transporting freight, the volume of traffic, the return movement of empty cars, the direction of the volume of traffic, the net result upon the whole is shown by experience, have all had a marked influence. Imagination can not conceive of the innumerable facts and things that have brought about what is. Therefore, it is by comparison that we are enabled to know to-day what is a reasonable rate, and this proposition will not be disputed. If so, I would refer you to an abundance of testimony of railway men on that subject. For example, Mr. James Hagerman, of St. Louis, general counsel for the Missouri, Kansas and Texas Railway Company, in a brief filed before the Interstate Commerce Commission in cause 677, involving the class and commodity rates from St. Louis to

Texas common points, after reviewing the authorities, makes the following statement with respect to the standard of reasonableness of rates:

Therefore, when rates are shown to be those resulting from the force of competition and not in excess of the rates charged for the same service by other carriers similarly situated, the rates are not only *prima facie* reasonable, but are conclusively reasonable, as no other standard is or can be used for determining that question.

This is fully borne out by the expression of the Supreme Court in the case of *U. S. v. Trans-Missouri Freight Association* (166 U. S., 332), where the Supreme Court has said with respect to the question of reasonableness:

What is the proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return of the whole business done to amount to a sum sufficient to allow the shareholder a fair and reasonable profit? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities. Which is the one to which reference is to be made as a standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charge tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to the sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by the reasonableness of the charges for the transportation of the same kind of property by other roads similarly situated? If the latter, a combination between the roads would, of course, furnish no means for answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself, which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill will of the road itself in all his future dealings with it. To say, therefore that the act excludes agreements which are not unreasonable restraint of trade and which tend simply to keep up reasonable rates for transportation is substantially to leave the question of reasonableness to the companies themselves.

It is perfectly idle to talk about rates being reasonable or unreasonable *per se*. There is no such thing, because it must always be relative—because it must be determined by comparison.

I ask you, therefore, what factor or element in the equation of determining what is a reasonable rate may not as well be ascertained by a competent commission on investigation as by a traffic man himself. The Commission is an impartial tribunal; the traffic man is making rates to make money.

#### ADVANCES IN THE COST OF SUPPLIES, MATERIAL, AND LABOR OFFSET BY INCREASED TONNAGE.

It is stated that advances in rates are not unreasonable because they are justified by the increased cost of operation due to increase in the price of labor, supplies, and material, to which I reply that such advance in these prices has more than been offset by the increased volume of traffic and by the economies introduced in handling it.

As the country settles, as towns, cities, and villages grow up, as the population increases, as the volume of commerce increases to the

consequent increase in tonnage of railroad freight and increase in passenger travel, shall the result be that, notwithstanding these facts, the tax which the public-service corporations levy against those over whom they have the power of monopoly become greater? With more railroads and better facilities for transportation shall the prices of it increase to the public? If so, then every additional railroad that is built in every community, which divides the tonnage and reduces the earnings of the existing lines, furnishes a basis for increased rates.

In order to furnish this committee with the data necessary to prove the facts I state I file herewith, as Exhibit No. 3, a copy of a brief which I prepared and filed before the Interstate Commerce Commission in an investigation respecting the advances in the class and commodity rates from St. Louis to Texas common points, in which will be found, under proper headings, tables, figures, memoranda, and remarks with respect to testimony of witnesses, and which are to be found in the record of that case, and which will show:

First. That the total cost of labor in proportion to the gross earnings is not greater than it was in 1892 or 1894.

Second. That the increase in the price of labor was more than offset by what the labor earned in the service.

Third. That a dollar expended for labor in 1903 was more valuable and produced greater results in transportation than in 1892.

Fourth. That beginning with January, 1900, there was a gradual increase in prices of supplies until July, 1903, and since that time there has been a substantial decrease, so that the prices of supplies and materials are not substantially different to what they were in 1892.

Fifth. The tons of freight carried 1 mile per ton of fuel is materially increased.

Sixth. That the financial condition, expenditures, operating expenses, and net earnings on the southwestern lines is fully set forth in tables from which it is shown that net earnings have been increasing for twelve years and that based upon the real value of these railways they have earned a fair per cent on the cost of the property at all times and in recent years a very large per cent, more than can be earned in other large investments in real property.

Seventh. The economies in handling traffic are shown in which it appears that there has been a great increase in the number of tons carried 1 mile per mile of road, the number of tons per train mile and per loaded-car mile, and generally a decrease in the percentage of empty-car mileage, with a large increase in passenger traffic and earnings.

#### RAILWAY AND PUBLIC INTERESTS NOT IDENTICAL.

The oft-repeated and catchy expression that the railway interest and that of the public is identical is in no sense true with respect to the question of reasonable rates. Their respective interests are adverse and the identity of interests must always disappear when the one makes its charges against the other. That both are indirectly interested in the prosperity of the other goes without saying, but that unity of interest ceases the moment the one is to be made more or less prosperous by taking or requiring from the other more than is just

for a quasi public service. Thus it is that there must be always a conflict of interest upon the question of the amount a railway may charge, and this fact presents the supreme necessity of a tribunal which may, at least in all cases of disagreement, determine what is fair and just under all the circumstances. The railroads, being opposed to giving up their prerogative to themselves fixed the amount, are naturally in a position of antagonism to any adequate limitation of that privilege; and it will happen, as it must, that unless the voice of the people's representatives rather than that of the railroads is reflected in the provisions of any measure which provides the remedy, such remedy will prove fatally defective.

#### THE REMEDY.

I am surprised to hear gentlemen of well-known ability argue before this committee that the fact that there has been no judgment of the courts sustaining any decision of the Interstate Commerce Commission against the reasonableness of a rate is proof that rates are reasonable, and that no finding of the Commission to the contrary has been sustained. Until they shall point out some case in which the courts have overruled a decision of the Commission against a rate as being unreasonable there is no merit to the argument. The fact is that the Supreme Court has in no case held that the Commission's findings on the facts were wrong. It would more comport with a sense of justice for this committee to examine the decisions of the courts with respect to the points on which the Commission's decisions have been based than to accept the suggestion that it had missed the bull's-eye and like remarks. For your convenience I attach a synopsis, marked "Exhibit No. 4."

As stated by the Supreme Court in *T. and P. Ry. Co. v. I. C. C.*, that it has been the law for more than a hundred years that all unjust and unreasonable rates charged by a common carrier are unlawful, and it has been settled that one suing at common law may recover for any unreasonable or unjust or discriminatory charge (see *Call v. Western Union Telegraph Company*, — U. S., —); it is remarkable how few cases there have been of recovery of this character. The difficulty expressed by the Supreme Court in the *Joint Traffic* case of proving the unreasonableness of a rate undoubtedly is amply sufficient to insure railroads against many such suits, however exorbitant their rates may be. Therefore we must look to the remedy which fixes the rate in advance.

It needs no argument to show that it is quite within the exclusive power as it is the duty of Congress to appropriately regulate interstate commerce so as to produce justice and equality; and since the arteries of that commerce are the railroads, to regulate both the rates which they may charge and the service which they should render. I shall waste no time to convince those who are of contrary mind of the imperative necessity that this be done.

Probably not less than 65 per cent of all traffic on railroads is interstate, and a still larger proportion of the freight charges and passenger fares collected which make up the \$2,000,000,000 of railway earnings of this country which annually come from interstate traffic. The people being bound to pay it, shall the railroads charge what they may?

If it might be disastrous to the railroads for the shipper to fix the rates, may it not be so to the public if the railroads may without restrictions fix the charges? You must understand exactly the old law before amending it.

SYNOPSIS OF THE ACT TO REGULATE COMMERCE BY SECTIONS.

First. After making all railroads engaged in interstate traffic under a common arrangement for continuous carriage, subject to the act, it declares that all charges shall be just and reasonable and prohibits all unjust and unreasonable charges, and this is its most important provision, though the power to enforce it is quite imperfect.

Second. It prohibits discrimination between persons in the matter of charges for similar identical service.

Third. It prohibits undue and unreasonable preferences or advantages between persons, traffic, and localities.

Fourth. It prohibits charging more for longer than for shorter hauls under similar circumstances, over the same line in the same direction, except as may be allowed by the Commission.

Fifth. It prohibits pooling of earnings, and by its whole tenor intends to leave competition free and unrestricted.

Sixth. It requires all interstate rates to be published, filed with the Commission, and posted in their depots in manner provided by the Commission, and prohibits deviation from such rates till changed—in case of advance, on ten days' notice; or of reduction, three days' notice.

Seventh. It prohibits carriers from making local shipments out of through shipments, and intends to bring all interstate movements on through rates under the terms of the act.

Eighth. It declares the carriers liable for damages and attorney's fees for every injury caused by any violation of the act, and purports to furnish a remedy therefor.

Ninth. The injured party may proceed in a civil action for redress for such injury either before the United States circuit court in the first instance or before the Commission, and upon an order of reparation by it which is not obeyed, then to proceed in court to enforce such order.

Tenth. Every officer or agent of the carrier willfully violating the act or any provision thereof is deemed guilty of a criminal offense and subject to punishment by fine or imprisonment. So, likewise, is the shipper aiding or abetting in the unlawful transaction.

Eleventh. For the purpose of enforcing the provisions of the act the Interstate Commerce Commission is established, of five members, not over three of whom shall be appointed from the same political party.

Twelfth. It prescribes the Commission's duties, as follows:

That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act.

Also to prosecute through the Department of Justice all necessary proceedings to enforce the provisions of the act and to compel the production of witnesses and documentary evidence, but it is not given the power to fix any rate for the future.

Thirteenth. It gives the right to all persons, firms, corporations, associations, and boards and municipalities to make complaint to the Commission by petition of any violation of the act, which it is made the duty of the Commission, if the grounds appear reasonable, to investigate in such manner and by such means as it shall deem proper; and in like manner to investigate any complaint forwarded to it by any State railroad commission; and upon its own motion to institute any inquiry in the same manner and to the same effect as upon complaint, and no complaint may be dismissed for want of direct interest of the complainant.

Fourteenth. Whenever an investigation is made by the Commission, it is its duty to make a report in writing with respect thereto, and its findings of fact upon which its conclusions may be based, together with its recommendation as to what reparation should be made by the carrier to the injured party; such findings are in all judicial proceedings prima facie evidence of the facts found.

Fifteenth. If it appears to the Commission upon any investigation that the act has been violated and anyone injured thereby, whether complainant or other person, it shall serve a copy of its report upon the carrier with notice to cease and desist such violation, or make reparation for the injury done, or both.

Sixteenth. If the carrier does not obey such order to cease or desist, the Commission or anyone interested may apply to the United States circuit court for the proper district in a summary manner for a mandatory injunction to enforce such order without the formalities of equity proceedings; such court may take such evidence as it may deem necessary, but must treat the Commission's findings as prima facie correct, rendering a just judgment in the premises, being fully empowered to speedily enforce the Commission's orders. An appeal is allowed to the Supreme Court, but the circuit court's decrees is not suspended during such appeal. The expenses of such prosecution by the Commission is paid by the Government, and the court shall allow complainant attorney's fees in case the Commission's order be sustained.

Also, any injured party may file suit at law summarily in the United States circuit court to recover the reparation found to be due by the Commission and have a speedy hearing. In such case the Commission's findings are prima facie evidence of facts found. If successful, the complainant shall be allowed all costs and reasonable attorney's fees.

Seventeenth. The Commission shall conduct its business so as to secure the ends of justice, and adopt such rules as may conduce to that end.

Eighteenth. The Commission's salaries and expenses are provided for, and it is authorized to employ and fix compensation of its office force and other employees.

Nineteenth. The Commission's office is fixed at Washington, where its general sessions are held, but when necessary or more convenient sessions may be held elsewhere, and one or more of the Commissioners

may prosecute inquiries and take evidence in any part of the United States respecting any matter pertaining to the business of any carrier subject to the act.

Twentieth. It is provided that the Commission shall require the carriers to make annual reports to it, showing almost every conceivable item of the carrier's affairs in every department of its business.

Twenty-first. It is the Commission's duty to make its report annually before December 1 to Congress, containing all such data and information as may be valuable in determining questions relating to the regulation of interstate commerce, with such recommendations as to additional legislation as may be deemed necessary to perfect the act. The Commission has performed its duty in this particular, but Congress up to this time has not.

Twenty-second. Certain exceptions from the operation of the act are made respecting reduced rates or free service for the Government, States, municipalities, and objects of charity and charitable institutions, and officers and employees of railways. Also provisions for interchangeable reduced-mileage tickets, etc.

The remedies of the act are also declared to be in addition to common-law remedies, and such remedies, or those provided by the common law or by statute, are not affected by the act.

Twenty-third. The circuit courts of the United States are authorized to issue writs of mandamus compelling such carriers to furnish cars and facilities and to move freight upon same rates, terms, and conditions for one person as another.

Twenty-fourth. Full power to compel witnesses to testify, notwithstanding the testimony may incriminate him, is conferred by the amendatory act of 1893.

Twenty-fifth. The scope of the act respecting rebates was enlarged by the Elkins Act of 1903, so that every form of deviation from the published tariffs is prohibited under penalties of fines, the imprisonment feature of the former law having been eliminated; also additional powers given to the Commission to compel by judicial procedure the enforcement of published rates and to prevent discrimination in violation of the act.

It also makes applicable to suits by the Commission a certain enactment to expedite hearings in such cases before the United States circuit courts, providing for appeals direct to the Supreme Court of the United States instead of through the circuit courts of appeal. Since its passage the matter of direct rebates has largely ceased, though by various indirect means the railroads, to some extent, still practice it.

Except as to the safety appliances act, the foregoing presents a synopsis substantially of the principal provisions of the act to regulate commerce as it exists to-day, as applied to railroads. There can be little doubt that it was intended by its framers to be sufficiently comprehensive not only to prohibit all of the principal wrongs then known, but to furnish an adequate and speedy remedy therefor. But it was a new and untried comprehensive measure, and it was to be expected that defects would be found in the law, and that new conditions would arise to which it would not apply, and, therefore, that it must be amended to meet such exigencies from time to time.

## THE ACT TO REGULATE COMMERCE HAS BEEN OF GREAT VALUE.

That it has been of inestimable value no one familiar with the facts can doubt. The accumulated information contained in annual reports of railways and the records and statistical data covering, as they do, sixteen years of the marvelous railway development of the country in construction, consolidation, and operation of railways, as well as their financial operations, comprises a history which otherwise it would be practically impossible to obtain. Its value, therefore, can not be overestimated, because we would be groping in the dark in any attempt at railway regulation without it. It has been, therefore, equally valuable to the railways themselves and to the public. The same may be said of the tariffs on file with the Commission for the same period, comprising a history of rates otherwise unobtainable.

In addition to this, volumes of testimony and findings of the Commission in the many important hearings which it has held, in which opinions have been rendered, often by very able men, furnish an encyclopedia of learning upon the subject to which anyone may resort who desires to become educated upon the subject, but for which we, the public, would be like a schoolboy starting in the primer, so far as this subject is concerned.

And, again, the questions which have arisen in the courts, fought out by lawyers of great ability and decided by judges and courts eminent for probity and learning, have blazed the way and placed by the roadside landmarks of inestimable value to guide both the public and the railroads when confronted, as we are, with the question of appropriate railway regulation, which our worthy President emphatically declares to be the most important question before the American people.

So, therefore, to him who says that the act to regulate commerce has been a failure or a worthless enactment let it be said he has not fairly measured it.

It is no uncommon thing to read in the papers and to hear from the platform declarations that the law as it stands is worthless, but what has been said shows that such statements are incorrect. That the law has been discovered to be seriously defective is undoubtedly true, yet it affords some remedy, though very imperfect, and is being constantly resorted to as the only means of railway regulation. Many of the Commission's decisions are complied with, and the fact that it may be resorted to with a fair show of success, after protracted litigation, has no doubt some beneficial restraining effect. On the whole it may fairly be said to have been of very great benefit to the public.

## PRESENT LAW SHOULD BE RETAINED, BUT PERFECTED.

You will observe from the foregoing analysis of the act that the machinery of the law seems complete. In fact, its provisions have been put into working order, and a system of operation thereunder has become established. The country has become familiar with it and the proceedings under it. The decisions under it may be used as precedents and the machinery kept in working order without the dangers which would surely follow a new system. Therefore, considering the comprehensive character of the act, its many wise and



salutary provisions, it certainly seems to me that when we approach the all important and complex problem of railway regulation we should profit by experience, holding fast to that which is good, discarding that which is bad, and render perfect that which is imperfect. My object, therefore, is to point out these features and to show, if I can, what ought to be done as well as the danger which may follow the enactment of a new and untried complex system, thereby possibly destroying what we have and leave us with a law more imperfect.

#### THE IMPERFECTION OF THE PRESENT LAW.

The fourth section, commonly known as the "long and short haul clause," it was supposed, was intended to prevent discrimination between localities and persons in transporting over the same line in the same direction at a less rate for the longer than shorter haul. The qualifying words, "under substantially similar circumstances and conditions," it was supposed, and the Commission so held, would apply in case of water competition, but not competition by railroads with each other. But the Supreme Court held otherwise, and now the act as construed means that if there is competition at the farther distanced point with other railroads, the section does not apply, because in such case the carriage would not be under substantially similar circumstances and conditions.

The undue-preference clause of the third section has fallen by the same criticism wherever the preference arises from the same cause; and it has been expressly held that the qualifying words of the fourth section, just quoted, gives the right to the carriers to make such discrimination or preference in cases of dissimilarity existing alone from railroad competition. So from practical effect, so far as I can see, sections 3 and 4 might as well be repealed in so far as they apply as bases of rate making to commercial centers or railroad crossings. Under the interpretation of the act by the Supreme Court, which all must admit to be correct whether we think so or not, it is for the court to say what are similar and what are not substantially similar circumstances and conditions, so that you can never know in advance what it will consider dissimilar—the term is so comprehensive. You can see from this how disastrous to this feature of the law it was for its framers to have used such inapt yet comprehensive and flexible terms as "under substantially similar circumstances and conditions." This illustrates how the whole purpose of an enactment may be defeated by nullifying exceptions and qualifications.

These defects can be cured by simply striking out the qualifying words and leaving it to the Commission to determine the circumstances and conditions which will make it reasonable that a greater charge for the short haul than the longer haul be allowed. If anyone suffers from such amendment it will arise from the just application of a beneficent rule. This section should either be thus amended or repealed.

#### REASONABLENESS OF RATES AND HOW TO DETERMINE.

The Commission may not designate what the proper rate is to be substituted for one found to be unlawful, because the act does not

distinctly so provide; neither is it within the power of any court or tribunal to do so, because the rate-making power can not be delegated to the judiciary.

It needs no argument to show that the law, being in this state, is very imperfect; while it prohibits unjust, unreasonable, and discriminatory rates, the machinery provided for its enforcement has proven inadequate. Every provision for its enforcement seems on its face to be complete, even to minute detail. The Commission is apparently clothed with full power to enforce its provisions, but this appearance became a mere shadow when it was found to be defective in that it did not specifically empower the Commission to name the rate to be substituted for the unlawful one. This emasculated the law as it was previously supposed to exist.

It is this imperfection which leaves the public with no adequate or speedy remedy to obtain redress in cases of unreasonable rates. It is this imperfection which has caused the entire shipping interest of the country, except the favored ones, to demand the amendments of the act and largely induced the President to strongly recommend it. Through repeated decisions of the courts and Commission, we have become familiar with the very point wherein lies the trouble. Why not remove the trouble—eliminate the imperfection exactly at the point where we know it exists? If that is done, the Commission, instead of making a recommendation merely, can say to the carrier "We have upon full hearing ascertained that a certain rate is too high, and that a certain rate would be a proper one; it is our opinion that it will afford you fair compensation; you shall henceforth charge that rate unless conditions so change as to entitle you to charge more." Need anyone fear that the Commission will make the rate too low? I do not believe anyone is justified in any such assumption. I believe there has been no case in which the courts have said so, but wherever the Commission's orders have been set aside it has been upon the ground of some defect in the law or in the procedure, and mainly because of want of power.

All commissions and courts must be imperfect and err in judgment, and if we wait for absolute perfection and just judgments in all cases before we have a remedy, then all law and all remedies must fail.

#### NO DANGER OF COMMISSION MAKING RATES UNPROFITABLE TO RAILROADS.

The oversolicitous railroad representative conjures up in his mind a scheme of confiscation by the Commission being granted the power to name a proper rate to be substituted for an unlawful one, and with elongated countenance deplors the prospect and thinks he faces ruin. Such is a mere figment of the imagination. The railway henchmen can always see ghosts of destruction in railway regulation, but the destruction has not happened. It is only a ghost. Is it more in accordance with justice that the railroads be permitted to continue charging a rate held by an impartial tribunal to be unjust and unreasonable or discriminatory and have the shipper stand the loss than to require observance and let the railroad stand the loss of its unjust exactions? The proposition is that when the Commission decides that the rate is just the shipper must pay it, and when the Commission decides that the rate is unjust the shipper must continue to pay it

until some court decides that the Commission's decision is right. And all of this because of an unholy fear that the Commission will rob the railroad. In other words, the railroad must be permitted to rob the public in order to prevent the Commission robbing the railroad. In the former case there is the motive of gain; in the latter, no motive except justice.

PROPOSITION THAT RAILROAD WILL REIMBURSE THE INJURED PARTY  
UNSOUND.

The proposition that the railroad can and will reimburse the shipper upon the Commission's decision being found correct, while if the Commission's decision is found to be incorrect the railroad can not be reimbursed, and therefore that the Commission's order should not become effective till final determination by the courts, presupposes, first, that reparation can be made to the really injured person, and, second, that by the Commission's order reducing a rate will operate as a loss to the carrier. Neither of these suppositions are maintainable; in fact, are impossible. The matter must be considered from the standpoint of a given case, from which a rule for the many may be deduced. Take, for example, the advance in freight rates on all class goods and most commodities from St. Louis to Texas common points, of an average of, say, 10 per cent, made in March, 1903. The Commission made an investigation into that advance, but has not yet decided it. Now, suppose it holds the advance unreasonable, who will be entitled to reparation? You will at once say, "The person who paid the freight;" and the inquiry then is, Who paid it? Take a carload of furniture, or agricultural implements, or sugar, for example. The jobber, wholesaler, or commission merchant adds the freight in the price to retailer, and the retailer to his customer; so it results that the consumer pays it. Can the wholesaler justly claim reparation? He was not injured. Can the consumer do so? He did not pay anything direct to the railroad, nor can he afford to fool with the small amount which was added because of the advance. Can the merchant whose business has been crippled thereby recover it?

Thus it seems impossible to make restitution to whom it belongs. Let it be admitted that as applied to some traffic it may be done, yet in 75 per cent of the cases it can not be done. It may sound pretty to give a bond to pay back the unlawful rate, but it amounts to little when the real injured party can't be found, or, if he should be found, has an interest too small to consider. The law now provides for reparation and is entirely as efficient as any proposed bond to make reparation, so the bond would be mere surplusage.

As to the Commission's order resulting in loss to the carrier, it by no means follows that a reduction in a rate will produce less earnings; that depends on whether the movement of the traffic is stimulated over the given line. Railroads have frequently reduced rates for the purpose of making more out of the business. It is well known that a high rate may earn less than a low one on a given line of railway on a particular traffic. Justice is always a matter of approximation, and the rule of the greatest good to the greatest number must prevail.

Any attempt, therefore, to so frame a law as to permit a railroad to continue an unlawful charge on the condition of making repara-

tion to the injured party is a mere delusion, and must result in the railroads retaining the principal part of the unlawful booty. There is never any danger of the Commission requiring that traffic be carried at a loss, but if it does so it will be enjoined.

THE GOVERNMENT SHOULD PROSECUTE THE INQUIRY AND NOT REQUIRE OF THE SHIPPER THE UNEQUAL TASK OF LITIGATION.

If a given shipper is dissatisfied with a rate of freight or any advance in it, he will not generally enter into litigation with half a dozen railroads, because the contest is entirely unequal. He can not afford the expense; he can not get the witnesses; he can not take the time which would be necessary, and hence any remedy which does not provide for the Government to take up the contest will be of little practical benefit. Let me illustrate: The Cattle Raisers' Association of Texas being dissatisfied with certain advances in rates on live stock in Texas to market and elsewhere, in February, 1904, instituted a proceeding before the Interstate Commerce Commission attacking the reasonableness of these advances. The first hearing was held at Fort Worth in April, 1904, and occupied several days in taking testimony of witnesses brought from various distant points at large expense to the association. The next hearing was held at St. Louis in June, 1904, and there the railroads introduced testimony for almost a week. In the meantime the cattle growers' interstate executive committee brought to the attention of the Interstate Commerce Commission the claim of shippers in other parts of the West that the rates were unreasonably high and the service bad.

The Commission, on its own motion, ordered an investigation. That inquiry, together with the Cattle Raisers' Association case, with which it had been consolidated, was set down for hearing at Denver in September, and occupied several days in the examination of witnesses brought largely from a distance. The next hearing was held at Chicago, occupying a week. The next hearing was held at Fort Worth, where the evidence was practically concluded in December, 1904, at which the Cattle Raisers' Association examined witnesses brought from a great distance at large expense. The case now made by the testimony, if all of it were written out, including the exhibits and documents as well as the testimony of the witnesses, would embrace more than 20,000 pages of typewritten matter. The case is yet to be briefed and argued before the Commission. Now, suppose the Commission should decide the case in favor of the cattle raisers' contentions? If the railroads do not voluntarily obey the Commission's order, either the Commission must proceed or the Cattle Raisers' Association must proceed by a bill in equity to enforce the Commission's decision; otherwise there is no penalty for disobedience. If this great volume of testimony is placed before the court for consideration and the court should decide adversely to the Commission, on any appeal therefrom the record must be printed. With the regular charge allowed to clerks for having the record printed, that one item will cost \$15,000. Of course, if the case should be brought by the Commission the Government would pay the expense, but if the Commission did not see fit to bring it the shipper would be practically deprived of his remedy on any appeal, because of the expense of printing the record. True, the Commission has

usually paid that character of expense, but under the present law it is not bound to proceed, and therefore the option to the shipper to do so is, from a practical standpoint, a worthless one.

Furthermore, in any proceedings involving rates on any given commodity or any schedule of rates the general public in the vicinity where the rates apply is affected to the same degree as the shipper, and it is therefore a matter of public concern and not merely a matter which concerns a particular shipper.

Hence I say that all the law should require is a specific complaint, which the shipper makes, and if upon investigation it appears proper to do so, the Commission should institute an investigation and the Government bear the expense of it, and any remedy that falls short of that will not be adequate. The machinery of the law already provides for this, except that the case proceeds before the Commission upon complaint at the expense of the shipper, except in cases where, on its own motion, the Commission institutes an inquiry.

THE COMMISSION SHOULD DETERMINE THE FACTS AND ITS ORDER SUBJECT TO BE SET ASIDE FOR UNLAWFULNESS ONLY.

It has been repeatedly decided by the courts that fixing a rate for the future is a legislative act, whether done by the legislature or by a Commission authorized to do so, and that the power to fix a rate for the future can not be delegated to the judicial branch of the Government. The court can only determine whether the Commission has violated the law in the manner of performing its functions or violated constitutional rights in fixing such rates. If it has, its orders may be enjoined, and for this purpose the power is inherent in the courts to act, without any special authority. It has been repeatedly so held in injunction cases against rates fixed by State commissions. Precisely the same principle is involved in actions for injunction against the Interstate Commerce Commission if it is given the power to fix a rate for the future. Hence, to the over-solicitous railway representative let it be said the railroad is in no danger of having to do business at a loss by any act of the Commission.

Furthermore, the establishing of a court to supervise the acts of the Commission ought not to extend to matters of fact, but only to questions of the lawfulness of the Commission's orders. This is so because the determination of questions of the reasonableness or rates, or whether they are unduly discriminatory, and the like are questions of fact, and the experience of a Commission enables it better to determine the same correctly. It can not be compared to any other sort of case. The evidence to show a rate to be unreasonable is without limit, largely opinions, and in all cases the determination of the question is one of opinion—of judgment and not of law. The factors which the Supreme Court of the United States holds as most material are, the cost of the property, the cost of improvements, amount and value of securities, cost of replacing, probable earning capacity, cost of operation, excluding all fictitious indebtedness or watered bonds and stocks. But it holds that none of these are controlling, and at last the most certain test of what is a reasonable rate is such rates as is established by free competition, and therefore the policy of the law is to preserve competition and prevent combinations which destroy it.

Now, if you take any case which arises at this time, when competition has been largely eliminated, how is it possible to arrive at any conclusion as to what is a fair rate, except the enlightened judgment of an experienced and fair tribunal like the Interstate Commerce Commission, having on file all previous rates and statistics pertaining to the operation, earnings, expenditures, and finances of each road? For what good reason should any court review its decisions except to determine mere questions of their lawfulness and to preserve constitutional rights? The Supreme Court of the United States has repeatedly said that the Commission is more competent to pass upon the facts than the courts. This is manifestly so, because each investigation enhances its knowledge, and familiarity with the subject enables it to analyze and classify the facts, rejecting the errors, and to base its findings upon the reliable evidence aided by its own accumulated knowledge. As an example of this, in a case respecting dead freight, railway representatives testify that heavy train loading and heavy equipment has not proven an economy in operation. That was where the contention was made that because of these factors rates should not have been advanced. In another case, where the same roads are defendants, they proved that because of lighter train loading of live stock than other freight the advances in rates were justified. This shiftiness would enable the roads to hoodwink two different courts, but not so the Commission, which is entitled to use its enlightened judgment. Such examples might be multiplied indefinitely. In my opinion, there is no argument against leaving to the Commission every power which it now has and extending the same so that it may adequately and speedily enforce the provisions of the act without unnecessary interference from the courts. Mark it that those who oppose these simple amendments are not looking for railway regulation for the public good.

INTERSTATE COMMERCE COURT SHOULD NOT BE EMPOWERED TO SUBSTITUTE ITS JUDGMENT UPON THE FACTS FOR THAT OF THE COMMISSION.

The proposition, which has been made in various forms, to establish an interstate-commerce court should be very carefully scrutinized and its jurisdiction should not extend to the determination of the matters of fact, except in so far as the same might be necessary in ascertaining whether the Commission's decision was in violation of some law or constitutional rights. In other words, its judgment upon the facts should not be substituted for that of the Commission. It should be made to work in harmony and not in opposition to the Interstate Commerce Commission. It should be constituted in fact a court to protect the rights rather than to act as a trier of facts. Its object should be to speed, rather than to impede, the prompt enforcement of the Commission's order. There should be only one such court, so that on all questions it may act speedily as a unit, and its judgment should be final except on constitutional questions. Its power to review any action of the Commission should be confined to ascertainment of whether or not the Commission's order is in violation of law or constitutional right, and it should not be permitted to suspend such order pending the court's decision except where it is manifestly unlawful.

The procedure before it should require a prompt submission of the findings of the Commission and the original testimony; without the enormous expense of printing or copying, to such court on any application to suspend the Commission's order, and that it decide the matter of such application promptly upon that record. In all such matters a speedy determination is the most important element, and while the impossibility of a judicial procedure through the regular channels of our courts affording sufficient promptness may, and doubtless does, justify the establishing of such a court, yet the validity of any procedure before the Commission or the validity of its findings and decisions should not be made to depend upon the constitutionality of any law establishing such court or defining its powers, that is to say, if Congress makes a mistake in the one law it should not affect the other. We have all along supposed that it is not within the constitutional right of Congress to vest in the judiciary rate-making powers, directly or on appeal, though it may confer such power upon a commission. In view of which it will be readily observed that in the event of such power being conferred upon the Commission no appeal could lie to any court for a review of the Commission's determination of a rate for the future for want of constitutional power of the court to exercise the legislative function of rate making. We want the interstate-commerce act so amended that the Commission, after hearing on complaint, may name a proper rate to take the place of an unlawful one, and we don't want that power destroyed because of the invalidity of some law providing for review by some court.

Furthermore, it would seem foolish to have a court review the Commission's findings of fact and determination of what should be a proper rate; the findings of some one must determine it, and suppose the court has the power of review and should arrive at a different conclusion to the Commission; upon what ground could it be said that the court is any nearer right than the Commission? Why substitute the court's judgment for that of the Commission on the facts or questions of a proper rate, when a Commission is the more competent to decide it, as the courts have repeatedly admitted?

The only excuse for an interstate-commerce court is to provide an appropriate and speedy opportunity to have passed upon the questions pertaining to the lawfulness of the Commission's decision and protection of constitutional property rights; if it goes beyond that it will be a snare and a pitfall.

The courts as they exist now can afford to parties complaining of the Commission's decision respecting a future rate as proposed adequate protection. Certainly until the new part of the proposition—that is, the establishing of a special court—can be deliberately planned and carried out. There is no haste necessary, so let that part of it rest till you ascertain how much it is needed. How foolish it would be to establish a new court in a hasty and imperfect way.

THE PROPOSITION TO ALLOW POOLING UNNECESSARY; BESIDES, IT WOULD BE DESTRUCTIVE OF COMPETITION AND GOOD PUBLIC SERVICE.

The present law prohibits pooling; that is, it prohibits two or more lines of railroad leading from one commercial center to another from agreeing that they will divide their earnings or traffic. That provi-

sion of the law was no doubt inserted so as to preserve competition, both in respect to the matter of rates and quality and character of service. It looks to me that it will be a step backward to now legalize pooling and destroy competition. I can not see that it will have any material effect upon the question of rates if the Commission is given power to fix rates in case of a pooling agreement or arrangement, but the question of service performed for the rate charged is quite as material as the rate itself, both with respect to the carriage of freight and passengers. There would be no way in which the Government can successfully regulate the quality of the service which shall be rendered for a given rate. It could only do so in a general way. I predict that in case Congress should legalize pooling that it will be found by experience that it will be at the sacrifice of the service in point of quality and time. There does not seem to be any necessity for it. It is not necessary in order to prevent rate wars, since there can be no competition if the railroads all maintain their published rates. If one reduces a rate, the other does or may, so that very little traffic will be diverted by the reduced rate from one line to another. Besides, most of the rates are made practically by agreement between the interstate lines.

I have no hesitancy in saying that it is an advantage to the railroads to be able to agree upon the rates which shall be charged, and such agreement through traffic associations or otherwise might be legalized provided the rates thereby made are put into effect under such agreement and are subject to the supervision of the Commission in every case as a condition precedent to being effective, and thereafter to investigation and change upon complaint. That sort of an arrangement would leave out the danger of rate wars, which is the main argument in favor of pooling, but would leave the public the benefit of competition in the matter of service, as each road will undertake then to render such service as to induce the largest movement over its lines, and still be left with the incentive to afford the best service possible to get the business. I believe in retaining the present law with such additions only as are necessary, and after perfecting it let it be fairly tried. It is like having a complicated machine, every part of which works well, but there is a want of sufficient power to produce results. Let the power be given the Commission to operate under the present law and the public will have as simple a remedy as possible, and the railroads, knowing that the remedy exists, will adjust most of the disputes with shippers without compelling a resort to the Commission.

I desire to impress upon the members of this committee that if you make a provision in any bill which contains an interstate commerce court that such court shall pass upon the reasonableness or the fairness of the decisions of the Commission, or their justness, you might as well abolish the Commission entirely, because the question of reasonableness is a question of fact, and the court would simply be substituting its judgment for that of the Commission without the power to fix the rate for the future. In such a case the court would be destructive of the power of the Commission, as it might happen that its judgment was different from that of the Commission.

The making of the rate by the Commission is a legislative power, and it has never been considered that the courts have jurisdiction to inquire into the reasonableness of the action of a legislature or a legis-



lative commission in determining the facts. It is unnecessary, because if the Commission acts lawfully, within the limits of the Constitution, there need be no fear that serious injustice will be done, and if Congress has not confidence in the Commission acting justly in the premises, upon what consideration might it be expected that the court would be better qualified to do so?

Suppose, for example, that the Commission should decide that a given rate, under all of the circumstances was unreasonable to the extent of 1 cent per 100 pounds. That would be a matter of judgment. Now, suppose that the court should hold according to its judgment it should not be advanced and set aside the findings of the Commission simply because the court might think that the Commission's decision was not reasonable. There is just as much sense in having another court to pass upon the reasonableness of the judgment of that court, and so on, ad infinitum, as to have a court determine whether the Commission's decision is reasonable.

I desire also to call this committee's attention to the fact that in the bills so far presented, wherein it is proposed to have a court to review the action of the Commission, it is only the railroad that is given the right to review. Can it be possible that the railroads have greater rights in this particular than the public? I say that if the court is to be given the power to determine whether the Commission's decision is reasonable the public and the shipper is as much entitled to it as the railroad and they will demand it, and on behalf of my clients I do demand it at the hands of this committee. My judgment is that it will be found that it is destructive to the act to put any such provision in it.

#### THE BOND OF THE RAILROAD TO REFUND TO THE SHIPPER.

I undertake to say that this provision is simply an illusion in the form in which it appears in any of the bills which I have seen. I am speaking plainly, but to the point. What need is there for the bond of a solvent railroad company to bind itself to pay back to the shipper the unreasonable charge but to burden the shipper to sue the railroad company on the bond in order to recover it? He has exactly the same right under the common law to-day, and he has the same right under the interstate commerce law to-day. He can not resort to it; he will not resort to it; and it will be of no benefit whatever. The present act provides fully for reparation. It provides that in case the rate is unreasonable or otherwise unlawful the Commission may order what reparation it recommends that the carrier shall pay to the shipper, and the shipper can make his case in court by filing a petition to recover that money, in the trial of which the findings of the Commission are *prima facie* evidence. If he succeeds, the court allows costs and attorneys' fees. Therefore, the bond proposition is an entirely useless incubus in cases of solvent railroads and no suit will ever be brought upon it.

#### WARNING.

From a careful and exhaustive study of the interstate commerce act and the decisions of the courts with respect to the same, having detailed knowledge of its provisions and the practice under it, I beg

to warn this committee, if it desires effective legislation, to act not so hastily as to turn out and present a bill that does not bear the impress of deliberate and careful judgment.

EXHIBIT No. 1.

*Cattle rates from Southwest higher than any time in fifteen years—General complaint—Rates for Southwest fixed by combination of the railroads—Competition eliminated—Testimony of railroad officers in the matter of class and commodity rates from St. Louis to Texas common points in force over the Missouri Pacific and other railways.*

[C. HAILE, freight traffic manager of Missouri, Kansas and Texas Railway Company.]

Mr. BRYSON. Had you in the face of these new rates of March, 1903, taken into consideration the water-competition feature from New York to Galveston? Was that a controlling element?

Mr. HAILE. Possibly not a controlling element, but a very important factor in the making of the rates; it was really one of the strongest factors that appeared to my mind. I had, previous to our announcement of this advanced scale, a great deal of talk with the representative of the Mallory Line.

Mr. BRYSON. That line is not subject in any way to the filing of tariffs with the Interstate Commerce Commission?

Mr. HAILE. I understand not from New York to Galveston; so far as parties to a through rate is concerned, I do not know whether they file their rates or not. But I was going to say that I had a talk with the view of determining whether or not it was possible for them to make any advance, in view of the competition they have from tramp vessels—schooners. I was satisfied in my own mind that so far as the rail lines from St. Louis were concerned—and from Chicago we were all of one opinion—that the rates ought to be advanced; that there was no reason why they should not be, and every reason from our own standpoint why they should. The question arose with me as to whether or not it was possible to get these rates, these water rates, which might be used to defeat any through tariffs, advanced, and I was satisfied from this conference with Mr. Warfield that they could make some advances in their rates, and I knew about what volume of advance that would probably be.

Mr. BRYSON. There was no understanding or agreement between you and the water representative what the advance would be?

Mr. HAILE. Absolutely none.

Mr. BRYSON. You felt it your duty to advise yourself whether your line, independently, could undertake to advance the rates on your line?

Mr. HAILE. Yes, sir.

Mr. BRYSON. I think that is all.

Commissioner PROUTY. Mr. Haile, most of the articles to which these advanced rates apply are produced both in the Middle West and on the Atlantic seaboard, are they not?

Mr. HAILE. A great many.

Commissioner PROUTY. And there must be a relation of rates between those two points and Texas common points?

Mr. HAILE. Yes, sir.

Commissioner PROUTY. Would it be possible for you to advance your rates without the rates from the Atlantic seaboard were advanced?

Mr. HAILE. I think the result would be to divert to eastern markets a great deal of the tonnage now handled from the middle western markets.

Commissioner PROUTY. As a matter of policy, you would not be disposed to make a general advance unless there was an advance there?

Mr. HAILE. Yes, sir.

Commissioner PROUTY. On the other hand, it would not be possible for them to advance their rates unless you advanced yours?

Mr. HAILE. I think not.

Commissioner PROUTY. Before the rates of the Cromwell Line were advanced, had you any talk or understanding with the managers of that line that if their rates were advanced yours probably would be?

Mr. HAILE. I suppose you mean the Mallory Line?

Commissioner PROUTY. Yes; the Mallory Line.

Mr. HAILE. I had a talk, as I say, with Mr. Warfield, and I told him it was the very earnest desire on the part of our people to make an advance in our rates from St. Louis, that naturally we could not do it unless there was an advance from New York, and I asked him, in view of the competition that he had to meet from New York to Galveston in the way of schooner competition and tramp vessels, whether they would bring about an advance in their rates to Galveston, and the net result of the interview was that they could probably make some advance without affecting in any marked degree the volume of tonnage they had. That was with reference primarily and, in fact, I think, solely to the business between New York and Galveston. I felt satisfied in my own mind that if they could make that advance, if they were satisfied that they would make the advance to Galveston they would not hesitate to make it to the interior.

[Mr. Haile had just stated that he had a theory respecting increase in damage claims, and that he could state it if desired.]

Mr. COWAN. You may do so.

Mr. HAILE. That is, that the cattle men themselves, believing from their standpoint that these advances in rates were not justified or proper, made up their minds to avail of every pretext or technicality to get back as much of that advance in the way of claims as possible. I do not mean that that resulted from a dishonest purpose, but it followed the advance in rates and was the result of the determination on their part to secure from the railroads every cent it was possible to get on such a showing as they could make.

Mr. COWAN. Now, Mr. Haile, that might apply to some of those who have made claims, but the evidence taken in this case as shown by many men engaged very extensively in the cattle business is that they have had very few claims. The principal cattlemen in Texas have very few claims, do they not?

Mr. HAILE. I know some men who do not.

Mr. COWAN. There may be that disposition on the part of some men.

Mr. HAILE. I think so.

Mr. COWAN. There has been a general complaint of an advance in rates, has there not?

Mr. HAILE. Yes, sir; there has been complaint.

Mr. COWAN. Is it not a fact that resulted in the Cattle Raisers' Association inviting a conference with the traffic officials at St. Louis some three years ago, in which the representatives of the association immediately met you and a number of traffic men to talk over the matter and see if we could not get the advances of 1899 reduced? Do you remember that?

Mr. HAILE. Yes, sir.

Mr. COWAN. And after giving consideration, you all declined to reduce them?

Mr. HAILE. Yes, sir.

Mr. COWAN. The advances which were made in those rates made them higher than they had ever been before?

Mr. HAILE. I think they are.

Mr. COWAN. Is it not a fact that for ten years previous to the advances made in 1899 the rate from Fort Worth, for example—which would be a fair one—had never been more than 31½ cents per hundred pounds?

Mr. HAILE. I will tell you. I think that is substantially true, Mr. Cowan.

Mr. COWAN. Is it not a fact that during that period—say, from 1890 up to 1899—that the rates had gone from 25 to 28½ cents for the major portion of the time to Kansas City?

Mr. HAILE. No; I find that such rate was, in 1889, to Kansas City, 28½ cents, and it was advanced from that figure up to 33 cents, where it remained for a series of years, and was reduced again to 28 cents, and then advanced to 33½ cents, and then again to 36½ cents.

Mr. COWAN. When I said 31½ I meant 33½ cents; at all events, the 36½-cent rate to-day is a higher rate than has existed since the organization of the Interstate Commerce Commission and since we have had a file of the tariffs with them?

Mr. HAILE. Yes, sir.

Mr. COWAN. What else could you expect, then, than that the cattlemen would complain of the advances in these rates, when they did not know anything about your operating expenses and you have increased your volume of traffic?

Mr. HAILE. Oh, I expect them to complain.

Mr. COWAN. What better standard is there which a man should take than

what has voluntarily been kept in force for a long period of years? What better standard is there for him?

Mr. HAILE. It would depend on the conditions entirely under which that rate had existed.

Mr. COWAN. That rate existed under a condition, we will say, of competition?

Mr. HAILE. I think it is clearly shown in the testimony which has been taken in this case that it was an unreasonably low rate during all that period.

WEDNESDAY, January 25, 1905.

The committee met at 10.30 o'clock a. m., Hon. William P. Hepburn in the chair.

# STATEMENT OF MR. H. T. NEWCOMB.

Mr. NEWCOMB. Some time last summer I wrote a magazine article contending that the question whether rates had been advanced or decreased could not be decided without reference to the changes in the value of the standard money in which the rate is paid. I have since been requested by some of the railroad companies to apply the principles that I used in that article to this Senate Document No. 257, in which the Interstate Commerce Commission alleged that there has been a great advance in rates, and made the statement, which has been repeated here, that this amounted to about \$155,000,000, as compared with the year 1899, in the single year 1903.

Mr. BACON. One hundred and fifty-five million dollars in the last year, as compared with the next preceding year, not the four years past.

Mr. NEWCOMB. I beg Mr. Bacon's pardon; I think Mr. Bacon is in error in regard to that. I will read the statement, which is on page 5 of this document:

The average rate per ton for this year was \$1.0793, or nearly 12½ cents per ton greater than the average rate per ton for the year ending June 30, 1899, this difference amounting in revenue to \$155,475,502 over what it would have been at the average rate of the first-mentioned year.

Mr. BACON. I stand corrected.

Mr. NEWCOMB. Now, it is rather startling, Mr. Chairman, that this statement depends on an erroneous use of the Commission's own figures. The figures used by whoever prepared this report differ from those used by the statistician in the statistician's report, and the differences, as between the year 1899 and the year 1903, amount to one-third of the total advances. The author of this report gives the rate per ton for 1899 as 95 cents. As a matter of fact, it was 97 cents. He states the first year of his comparison too low. He gives the year 1903 as \$1.07, when, as a matter of fact, it was \$1.05. So that he puts the first year 2 cents too low and the last year 2 cents too high, and if we correct those figures by using the figures in the statistician's report, which were open and available to the author of this report, at once \$53,000,000 of this increase disappears. I will furnish, to go with my remarks, a table showing the figures furnished by the auditor for this report, and the reports which are available to the statistician. But, Mr. Chairman, a calculation of that sort depends entirely upon the selection by the author of the report of the year

which he shall make the basis of his calculation. These rates per ton have differed from year to year, and anyone can get any results which he pleases by using a selected year. In order to show this I have made a table on precisely the same basis, taking the year 1904, and I show in columns the results as compared with the Commission's table; but it appears from my figures, using the year 1904 instead of the year 1899 as a basis, that on that comparison there was a lowering of rates amounting to \$234,000,000.

I do not attach great importance to that table. It merely shows how easy it is to use figures of this sort to get any result you want. The Commission might, perhaps, have gotten an even higher figure if they had taken another basis, and I can get a much higher figure again by having some other basis. Anything in the world can be gotten by taking figures of that kind. One result is as real as the other.

It is proper to call the attention of the committee to the increased expenses of railroad companies as between those two years which were used for that comparison. Between 1899 and 1903 operating expenses increased \$400,000,000. Wages paid to the employees of the railroads increased \$222,000,000. The cost of maintaining structures and equipment and roadbed increased \$175,000,000, and the fuel bills of the railway companies increased from \$77,000,000 to \$146,000,000, or \$69,000,000 altogether.

I have also made some calculations showing the efficiency of money payments for fuel, for operating expenses, for wages, and so forth. It appears that for every dollar paid out in wages in 1899 the railways were able to carry 294 tons of freight a mile. In 1903 for each dollar paid in wages they were only able to carry 240 tons a mile. So that with that slightly higher rate it affected their earnings per ton per mile, and they could only earn from freight \$1.88 where they earned \$2.13 in the earlier year.

The efficiency of the amount paid in wages was less in 1903 than it was in 1899. I have made similar calculations relating to coal, which show that for a dollar paid for coal the railways were able to earn \$9 from freight in 1903 where they earned \$13.25 in 1899.

The same is true of their operating expenses, the figures being \$1.05 in 1903 as against \$1.19 in 1899. On page 6 of the report we find considerable discussion as to the advances of rates of particular articles. I selected the article of hay, which was advanced from the fifth to the sixth class, and that advance is now the subject of litigation. The Commission states that this is an average of about 80 cents a ton on 12,000,000 tons. I do not know whether that average is correct or not, but perhaps it is worth while showing that the price of hay has gone up so much during the year that if the railroads did get the advance of \$14,000,000 which the Commission thinks they got on account of this higher rate, the additional farm value of the amount moved during that time was \$34,000,000, or two and a half times as great; and it is worth noting that during the four years used for this comparison, although the crop was never as great as the crop of 1899, the value of hay to the farmers of the United States was \$204,000,000 more than it would have been at the price of 1899.

It was stated here the other day, I think yesterday, that there had not been any reduction in freight rates. I made a comparison on the basis of the report published by the auditor of the Commission about

a year ago, called a "Forty-two year review of railway rates," a document containing a good deal of very valuable data. There are three great classifications, you know, of the freight traffic in the United States. The official classification applies to all business east of the Mississippi River and north of the Ohio and Potomac rivers.

In that classification during the period from 1887 to date—or to the date of this report, some time in 1902—the net result of changes in the classification has been that 95 articles are classified higher than they were at the beginning of the period and 121 articles are classified lower than they were in the beginning of the period.

In the western classification, which applies on all classified traffic west of the Mississippi River and the Great Lakes to the Pacific coast, 65 articles are classified lower and 23 are higher than they were before. In the southern classification, which applies east of the Mississippi River and south of the Ohio and Potomac rivers, there are 254 reductions as against 125 advances. Those are net changes.

The CHAIRMAN. In what period is that?

Mr. NEWCOMB. That is during the period covered by that report. The auditor of the Commission receives something like 300 tariffs per day. They all make changes, and it is the common impression, I am told, that more of those changes are downward than upward. I took the pains to make some inquiries yesterday afternoon concerning the changes, and I found that within a recent period there have been some important reductions. Thus the rate on lumber from St. Louis, Kansas City, and river points to St. Paul and Minneapolis, Minnesota, and Wisconsin practically has been reduced from 16 to 14 cents very recently. Sugar from the Atlantic seaboard to the Missouri River and to New Orleans territory has been reduced. There has been a reduction on crackers and cakes and bakery products throughout the entire West, and on soft coal there has been a reduction from the Mississippi River to Iowa. Only one-half of the regular rates on seed wheat to Iowa, Minnesota, and Dakota are now being charged.

The lines from Chicago and Milwaukee to the Mississippi River have made a reduction from 10 cents to 9 cents on wire articles, nails, etc. The grain rate from Mississippi River crossings to Ohio, Indiana, Michigan, etc., have been reduced from 1 to 5 cents each. There is a great reduction pending covering the entire through south-bound business from the Ohio River, Chicago, Cincinnati, St. Louis, and all points using the Ohio River as a base to the great cities of the South, and that will affect all contiguous territory.

As a result of these reductions all the rates from Baltimore, New York, Philadelphia, and Boston, and similar territory in the East have been reduced so that practically all manufactured products moving into the South have considerably lower rates than they have been taking. And those are voluntary reductions. The rates to Atlanta are reduced 9 cents on first-class freight, about 9 per cent of the old rate. The reduction on second-class freight is 5 cents, on third-class 3 cents, on fourth-class 5 cents, on fifth-class 4 cents, and so all along the line. Other cities the rates to which are reduced are Dalton, Cartersville, Athens, Elberton, Augusta, Macon, Milledgeville, Albany, and Americus, and, as I said, practically all of the territory in that region.

I have here from another Government document a table showing the course of rates on wheat and flour from Chicago and St. Louis to New York. These are the most important rates in the country. The Chicago and New York rate is not only the basis of the rate on all grain from any territory west of Buffalo and Pittsburg, and a line drawn through there—what we call the Central Traffic Association territory—but by the application of differentials is made the rate to all eastern territory on all that freight, whether for domestic consumption or exportation. It is far the most important rate in the country. That rate from Chicago to New York has declined per bushel. It was \$6.63 in 1899, the average for the year, and \$6.17 was the average for 1903. The table shows a decline from 15.7 cents to the present basis. I have compared the rates per bushel on wheat from Chicago to New York with the farm value of wheat, and it appears that where it took 1 bushel in every 5½ in 1899 to pay the freight from Chicago to New York, it only takes 1 bushel in every 7.82 bushels to pay the freight at the present time. That is, 7.82 bushels of wheat will now move from Chicago to New York for the price of 1 bushel, while only 5 bushels would move at that price in 1899.

Mr. BACON. I would like to ask Mr. Newcomb if he considers this a fair comparison, as regards the price of wheat, which is now very high. It is 25 or 30 cents higher now than has been the average price during the last five years.

Mr. NEWCOMB. For 1902 the comparison would have been: It took 1 bushel in 7.20 as against 1 bushel in 5.25 in 1899, so that about the same result would follow in last year or any other year of that series.

#### **STATEMENT OF HON. H. STEENERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA.**

Mr. STEENERSON. Inasmuch as I have prepared a couple of drafts of a bill to accomplish the purpose recommended by the President in his message in regard to extending the powers of the Interstate Commerce Commission, I thought that I would appear before this committee and give my views.

In the first place, I shall assume that the reason for this legislation is apparent to the committee and that the evils to be remedied are recognized, as they seem to be by the public sentiment throughout the United States as well as by the Executive. So that it is not necessary at all to dwell upon that feature. I will assume that the necessity for the legislation exists and that it is desired to meet that necessity. Neither do I care to discuss the objections which have been made to this legislation, that it would injuriously affect capital invested and labor. Those facts are not new to the committee nor to the American people. Those objections have been heard in the United States almost in the same terms for the last thirty-five years, almost ever since the first granger legislation in Illinois and other western States.

I recall very distinctly that I served in the senate of Minnesota in 1885, just twenty years ago, when we proposed to establish a railway commission to regulate freight rates by law, and these same objections were made. We had ten years before that time prescribed by a statute the maximum rate for transporting passengers—3 cents a mile. That was twenty years ago, and that is the maximum rate

to-day in Minnesota; but at the time it was prescribed every railway man in the country said that it would ruin and bankrupt all the railroads and stop all railroad construction. And when we sought twenty years ago, as I say, to give this power to public officials, dire disaster and ruin was predicted. But what followed? Of course the act of 1885 in Minnesota did not contain the power, but two years later it was conferred, and although that was not in the proper language, so that it was set aside in the milk-rate case by the Supreme Court, later the State did put it into their law—in 1891—and that has been in operation ever since, and we have reduced the charges for transportation on grain, and I brought that case before the Commission myself and conducted the trial of it, whereby the transportation rate on grain over the Great Northern was reduced, and the railroad, after it was put into effect, adopted the same rate as was prescribed by the Commission. That has been our experience; and in every instance the railway companies' representatives have predicted that it would ruin them, whereas, in fact, it has benefited them; and if you ever refer to the book written by A. B. Stickney, president of the Chicago and Great Western Railway, in 1893, fourteen years after the passage of the interstate-commerce act, I think you will be satisfied that he proves to your entire satisfaction that instead of being an injury to railroad capital and railroad labor, public regulation and control of transportation rates is a benefit. The power, when it was exercised without limitation on the part of the State by the transportation companies, was so abused that in many instances railroad capital was entirely wiped out and destroyed. So that I will not dwell upon that feature of the case.

My studies have been confined lately to the legal aspect of the proposed bill. But in order to understand fully the legal form which the proposed statute should take, I want to remind the members of the committee, although I am quite satisfied that they all know it, that they should bear in mind that there are certain principles of law that are absolutely settled and are not subject to controversy in the United States, although some of the speakers who have been before the committee do not seem to recognize the fact. These principles have been settled by the Supreme Court beyond any question of doubt. It is settled that the exercise of the power to prescribe a freight rate for the future is a legislative act, and that, further, such a legislative function can not be exercised or performed by any court. Now, inasmuch as the Constitution says that the judicial power in the United States shall be vested in one Supreme Court and such other inferior courts as the Congress may from time to time establish, it is apparent that if you call a body a court, they are thereby simply endowed with judicial power and not with legislative power, and consequently, under the decisions of the Supreme Court, can not review the action of a commission that prescribes rates for the future, except with this limitation—and that is the only qualification that exists—that they may review that action because it is the same as a law, the order of the Commission in regard to rates in the future, or the same as an act of Congress prescribing what rate shall be charged in the future. They stand absolutely on the same footing, and the power to delegate that authority is conceded. There is only one ground upon which a court can review that kind of legislation, whether it is by act of Congress or by order of a commission,



and that is upon the ground that it takes private property without compensation or without due process of law, in violation of the fifth amendment to the Constitution, in case it is made by the United States authority, or in violation of the fourteenth amendment to the Constitution of the United States in case this legislative authority is exercised by a State.

Mr. TOWNSEND. I would like to ask Mr. Steenerson to define a word, if I may.

Mr. STEENERSON. Certainly.

Mr. TOWNSEND. In most of these bills it is provided that the court may review the decision or order as to its reasonableness and lawfulness.

Mr. STEENERSON. Yes.

Mr. TOWNSEND. What can you say as to what "reasonableness" would include; whether that is a question of fact?

Mr. STEENERSON. No; I conceive that probably the strongest bill that was ever before a court in favor of the idea that the court could review the question upon the facts was in the case in the State of Minnesota, the case which I referred to which I argued before the Commission myself; and it was argued by General Clapp, our attorney-general, before the supreme court of Minnesota. There the court stated that they must construe the statute to mean that it only confers upon the court judicial power—that is, power to review the action, whether it is confiscatory or not confiscatory.

Judge Mitchell, whom I think everyone familiar with the judicial history of the State will recognize as one of the ablest judges that ever sat on the bench in that State, was particular to emphasize the fact that the only ground upon which any court could review the question was by virtue of the constitutional provisions that I have referred to, in order to determine whether or not it was confiscatory, or taking property without due process of law.

Mr. TOWNSEND. Would not that be covered by "lawfulness?"

Mr. STEENERSON. I think the court would be bound to construe "lawfulness" as simply "constitutionality." Now, these principles having been settled beyond peradventure, that is that the function is legislative, and that it may be exercised either by Congress directly or by a Commission, and that no power exists anywhere to review that action except upon the ground that it violates the Constitution, then where are we? The right of a court to enforce the Constitution is not dependent upon any statute of a State or of Congress. When I drew my first bill, which was referred to this committee, I modeled my bill, for want of any more extended knowledge of the subject, after the law of Minnesota—that is, I took the interstate commerce act, and I took section 13 of that act and put in there the words of the Supreme Court in the maximum rate case as they should have been in there to confer the rate-making power. I put those words in there and then I had special provisions for a review in the court somewhat similar to the provisions of the Cooper-Quarles bill, modeled after our statute; but upon reflection I made up my mind that this was utterly superfluous and unnecessary, because if the courts have the right to review it in order to enforce the constitutional provisions against confiscation, then they do not need any statute, any more than if you were to prescribe to-day that the maximum to be charged for transporting passengers over the railroads should be 2½ cents a

mile. That maximum rate can be attacked, and if they could show before a United States court anywhere that it was confiscatory of their property, then that court would enjoin the enforcement of that law as unconstitutional, without our putting into the act that they may do it, and prescribing the manner of doing it. So that I hold that it is better to leave the method of procedure to review these unconstitutional orders to the courts themselves. They have the power, and that is the only ground upon which they can interfere.

I therefore revised my bill, and I drew a bill, which is now No. 18043, modeled after this theory. I took section 13 of the interstate-commerce act and put in there that the Commission has the power to order a rate that is excessive in their judgment to be discontinued, and to substitute another schedule, and that the rate shall be the rate for the future. That is in unmistakable terms. After doing that I provide that that rate, so prescribed by the Commission, shall be the lawful rate, and then if the railroad company refused to obey it in the future, such railroad shall be subject to a penalty of \$1,000 a day. That makes it take effect at once when the Commission orders it to take effect. And further, I provide that the penalty may be recovered by the United States authorities, and shall be paid into the Treasury of the United States. We therefore have a complete law in itself, and the order of the Commission operates the same as an act of Congress. Now, it is true that that may be attacked because it is confiscatory. Very well; let them attack it, the same as they have attacked the statutes of Nebraska and other States as being confiscatory.

The question that is raised, undoubtedly, in the minds of many members is, How are we to avoid this interminable litigation that takes a long time, and which the Interstate Commerce Commission complains of?

They say that it takes several years in the courts, and presumably it was to avoid that delay that the proposed bill, known, I believe, in the papers as the Hepburn bill, the bill introduced by the chairman of this committee, provides for the extensive machinery to enforce it—nine circuit judges and a court of commerce, with all the officers necessary to carry out its functions, entailing an expense upon the United States Government of probably \$200,000 or \$300,000 a year. The idea in that must be that it will expedite cases of this kind and the settlement of those questions, and the only case of this kind that can arise is as to whether or not the rate prescribed is confiscatory or not. Let us bear that in mind, then. I claim that this machinery and expense is unnecessary, and for this reason: The records of the Commission and of the courts show that in no instance has the claim been made that the rate fixed by the Commission was confiscatory. What they did claim in the case that went to the Supreme Court was that the Commission did not have the power to fix any kind of a rate, confiscatory or otherwise. And it was the question whether the words in the law granted them that power. That was the question argued, and not any other.

Now, this same question would arise in a new law, because it would take years to find out what the law meant. A statute is never settled until the highest judicial authority in the United States has construed it. For that reason I think it would be a help to follow as closely as possible the old law, which has been construed, before we add any-

thing to it. Further than this, if the committee desires to carry out the full meaning of the President's recommendation—that is, that the rates shall go into effect, even if they are confiscatory, which I understand to be the meaning of the recommendation in the President's message—then, of course, leaving that as it was in the bill advocated by my friend on my left here, it would be undoubtedly unconstitutional, because you can no more confiscate a man's property for six months or a year than you can for one hundred years. But if you desire to carry out that, and if it is a delay in having rates take effect that you are afraid of, I have a suggestion to make to the committee, although it is not in my bill, whereby even that object can be accomplished, and I desire to call attention to this fact with that in view.

There is a difference in the provisions of the fifth amendment to the Constitution of the United States and the fourteenth amendment, aside from the difference that the one restrains Congress and the other restrains States. That is, the fifth amendment is a restraint upon the law-making power of Congress and the fourteenth amendment simply restrains the legislative action of the States so that they can not take property without due process of law or deprive a man of the equal protection of the law. The difference between these two provisions of the United States Constitution is this: That the one in regard to Congress, and limiting the power of Congress, says that no person shall be deprived of his property without due process of law, nor shall private property be taken without just compensation for public use. Those are the words that are not in the amendment that relates to the limitation upon States. Therefore, I say that if you desire to have a rate take effect, regardless of the fact whether it is confiscatory or not, then I believe the only way to do it would be to put in a provision something like this, to the law that I propose—that is, giving the power to the Commission to prescribe the rate for the future, and making it the lawful rate, and prescribing the penalty for not enforcing it—to add:

No court shall restrain the enforcement of any rate prescribed by the Commission under the authority of this act until after it shall have been finally adjudicated that such rate is confiscatory and in violation of the fifth amendment to the Constitution of the United States; and in the event of such an adjudication the carrier affected thereby shall be paid out of the Treasury of the United States just compensation for the time during which said confiscatory rate was enforced, to be agreed upon by the carrier and the Commission, and certified by the Commission to the proper authorities. Or, in case the amount is in dispute, the amount of such claim for just compensation shall be referred to the Court of Claims for determination, and when so determined, paid out of the United States Treasury.

Now, it might seem that that was a dangerous thing; but in view of the fact that this Interstate Commerce Commission has never, so far as I have been able to learn, prescribed a confiscatory rate or one that operated as a confiscatory rate, I do not believe there is the slightest danger. The danger that you apprehend is that the protest that it is confiscatory will be used to tie up the rate in the courts; but if we guarantee the rate made by the Commission against this confiscatory character then that objection is removed. And I am free to say that I believe that this would be a restraint upon the Interstate Commerce Commission against making rates that were confiscatory. If they knew that Uncle Sam would have to pay the loss then they would be very careful, and of course the company

could not be injured, because the amount of the loss could easily be ascertained. It would hurry up litigation, it would carry, probably, the question of whether or not the rate was confiscatory to the Supreme Court in a very short time, and during that time the matter could be computed to what extent it was confiscatory, and determined, and it seems to me that that would be taking property for a public use to that extent which the Government could pay for. That, I believe, would amount to less, if this suggestion should be adopted, then the expense of the interstate commerce court and the nine judges that are provided for in the Hepburn bill.

The CHAIRMAN. You think it would be lawful and just to permit the Government to tax a stockholder in a railroad and in that way to compel him to contribute to a loss that is suffered by reason of an unjust and unlawful benefit that a certain shipper may have had?

Mr. STEENERSON. Well, the United States Government does not levy any direct tax upon anybody; they are all indirect taxes.

The CHAIRMAN. But it pays taxes.

Mr. STEENERSON. He pays on his consumption, the same as anybody else. This is a new question to me; it only suggested itself last night to my mind, and I am not sure it would be satisfactory, but it strikes me that it would be a public purpose within the meaning of the fifth amendment to the Constitution of the United States.

The CHAIRMAN. A public purpose to aid a private shipper to ship his private property to market? You would regard that as a public use?

Mr. STEENERSON. I am not claiming that this is settled law; I am claiming that it is simply a suggestion that may be meritorious, and may not be; it may be impracticable to do so. Therefore I do not embody that suggestion in my bill. My bill simply provides that the power shall rest in the Commission to prescribe a rate for the future, makes it a lawful rate, and imposes a penalty for not observing that rate, and authorizes the collection of a fine by the United States Government. That is all that my bill does. And I believe that we can safely leave the question of a review of the law—a testing of the constitutionality of that rate—to the courts, without prescribing the method whereby it should be done, and I believe further that the cases would be so few which would be brought before the court that the present courts are ample, and that we would not be subject to unnecessary delay.

#### **STATEMENT OF MR. H. F. SMITH, REPRESENTING THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY.**

Mr. SMITH. Mr. Chairman and gentlemen of the committee, I speak for the management of the Nashville, Chattanooga and St. Louis Railway and, unofficially, for all of the important railways south of the Potomac and Ohio rivers east of the Mississippi River.

I speak, sir, as a practical traffic man, having had a number of years' experience in that territory. I want to say, in the outset, that I marvel at the interest or the anxiety expressed over the railway situation, particularly in the South. I am unfamiliar with the conditions in other sections. But, as a practical traffic man, dealing with these subjects every day, meeting people, meeting their views, revising their rates, I do not appreciate, can not appreciate, our

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management does not appreciate, why there should be so much anxiety over the relations between the railways of the South and the people. They are harmonious. The real captains of industry, with whom we deal, are not discontented. We have reformers in our section of the country the same as we have in all sections. They are clamorous. But the real shippers, the real developers of traffic and trade, the manufacturers, are not discontented in our district.

The honorable Interstate Commerce Commission in its eighteenth annual report refers to "the rapid disappearance of railroad competition and the maintenance of rates established by combination attended as they are by substantial advances in the charges on many articles of household necessity." It further says:

The Commission regards this matter as increasingly grave, and desires to emphasize its conviction that the safeguards required for the protection of the public will not be provided until the regulating statute is thoroughly revised.

I want to say that those views of the Commission do not justly apply to the southern territory—that there is no competition and that the rates are being advanced. In the southern country competition among the railroads was never keener than it is at the present time.

The first annual report of the Commission embraces the following statement:

A study of the conditions under which railroad traffic in certain sections of the country has sprung up is necessary to an understanding of the difficulties which surround the subject. The territory bounded by the Ohio and the Potomac on the north and by the Mississippi on the west presented to the Commission an opportunity, and also an occasion, for such a study.

That is the territory, Mr. Chairman, that I am speaking for.

The railroad business of that section has grown to be what it is in sharp competition with water carriers, who not only have had the ocean at their service, but by means of navigable streams were able to penetrate the interior in all directions.

I want to say, Mr. Chairman, that those factors of competition are as potent to-day as they were in 1887. In fact, in respect to the general transportation by water the conditions are very aggravated, the competition is very much greater. The competition, Mr. Chairman, that we have to meet is not only between carrier and carrier, but the competition that we do meet is between markets, between market and market, between product and product. The various carriers originating various characters of products—the products of the mine, for instance—are all in competition, one carrier as against the other.

As for the claim that the rates are being constantly increased, that does not apply to our territory, sir. I think I can truthfully say that 80 per cent of the changes in rates made in the South are reductions and have been for a number of years. Where advances are made they are to bring about equalization and remove discrimination and inequalities. The reductions in revenue, I should say, are not less than 90 per cent, and have not been less than that for three, four, five, or six years.

Mr. TOWNSEND. Ninety per cent of what?

Mr. SMITH. I mean that 75 or 80 per cent of the changes in rates are reductions, but that involves 90 per cent of revenue—10 per cent in revenue advances and 90 per cent in reductions.

Mr. Chairman, the influence of the Commission in our territory has been good. The occasional investigation by the Commission has had a good, salutary, and moral effect in the South, and we of the South respect the rulings of the Commission just so far as we are able to do so.

The Commission reports in its eighteenth annual statement to Congress that it has reviewed or has received 61 formal complaints in twelve months. And examination of the cases shows that only about 15 involved the southern railways. Some of them are of minor importance, as the Commission tells you. For example, some shipper has complained of the demurrage on a car of hay at Spartanburg. There are two or three such cases as that involved in the 61 complaints. That does not include what we call—or what the Commission is pleased to call—informal complaints. It has been the practice of the Commission to forward those informal complaints to the carriers directly interested, and in our territory it has always been a great pleasure to the carriers to give every attention to those informal complaints and adjust them satisfactorily to the complainants and report the results to the Commission.

The Commission in its eighteenth annual report disclaims the desire or purpose of seeking "power to arbitrarily initiate or make rates for the railways," but desires to be invested with the power "to prescribe the reasonable rate upon complaint and after hearing."

Now, in my experience I have never arbitrarily initiated any rates, and it is my business to revise rates. Those rates had been made for me long before I got into the situation of having to revise them. The traffic people of the South to-day are asking what the Commission has asked the power to do—to review and decide on the reasonableness of rates. We are constantly doing that. To avoid discrimination, the greatest publicity is given by one railroad to all of the others of its intention to change rates. Otherwise we would have a chaotic condition of rates, as you doubtless appreciate.

The whole time and attention of not less than 50 expert traffic people is given to the question of revising existing rates in the South to meet every changing condition resulting from the rapid development of the resources of that territory. Now, the wisdom of that practice as to the reasonableness of rates must necessarily be greater than could be obtained or maintained by a small commission who are occasionally having their attention directed to the territory. The danger of investing a commission with authority to revise rates and decide on their reasonableness, it seems to me, is demonstrated by the action of the honorable Commission in 1884, when it ordered the reduction in the rates from Cincinnati to eight prominent points in the South, an average reduction of 28 per cent. If the railroads had been willing and able to literally observe the order of the Commission we would have had a condition of rates in the South that would have been abnormal and very discriminatory. The order also required the lines south of Cincinnati to accept a like reduction in their proportion on shipments from Chicago.

The gentleman on my right has referred to some reductions that will become effective in the South on the 1st of February. I have been very closely associated with the action resulting from these changes, and I want to say, Mr. Chairman, that we commenced in

November and have worked industriously up to the present time to determine and arrange tariffs that will represent all of those reductions. Gentlemen, the reductions mean \$1.80 per ton on first class and 40 cents per ton on grain and many other commodities. To show you what that means to the Nashville, Chattanooga and St. Louis Railway, over 24 per cent of the tonnage of the Nashville, Chattanooga and St. Louis Railway is embraced in these commodities—grain and grain products and hay. Our railroad's proportion of that means quite an amount of revenue. The Chattanooga railroad for five years failed to pay its stockholders any dividends, notwithstanding the country was prosperous and the business of the road was materially increasing—that is, the gross earnings were materially increasing. It resumed, in 1904, paying a dividend of 4 per cent to its stockholders. It only takes \$400,000 per annum to pay a dividend of 4 per cent to the stockholders of the Nashville, Chattanooga and St. Louis Railroad. All reductions made in our rates, the reductions that become effective February 1, come out of the net. It does not result in increasing the volume of business, we can not force that beyond a natural growth, and we can not afford to reduce our expenses by modifying our service. The competition between carriers vying with each other to excel in service is too great in the South to admit of any company modifying its service if it wants to hold its business.

The CHAIRMAN. The time of the gentleman has expired.

**STATEMENT OF HON. GILBERT N. HAUGEN, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF IOWA.**

Mr. HAUGEN. Mr. Chairman and gentlemen of the committee, it is not my purpose to impose upon the generosity of this committee by taking up its valuable time in an extensive discussion of the subject under consideration. Nor do I believe that I can add to or throw any new light on the subject. This is a matter to which you have given earnest, honest, thoughtful, and careful consideration for weeks, months, and years. Men of ability and eminence from all parts of this country have appeared before you, and nobody has more thorough knowledge of the subject and situation and as to what should be done in justice to all concerned than have the respective members of this committee. However, I am grateful to this committee for its generosity and courtesy in extending to me a few moments for presenting my views.

Time will not permit my going into details, nor will I undertake to discuss the constitutionality of the proposed legislation. I quite agree with the suggestion made the other day by a member of this committee, I believe by the chairman, that the questions of law or legality of the measure had better be studied in executive session rather than in the public hearings. I will content myself by saying that in view of court decisions it is generally conceded that Congress has the power to regulate transportation rates. If so, I believe that under present conditions it is the duty of Congress to legislate so as to meet a universal, and I believe just, demand on the part of shippers and 99 per cent of the people.

At present the common carriers have exercised, and do exercise, exclusive power in regulating rates. The people have no voice what-

ever. Competition among carriers has been practically eliminated. Stable, equitable, and reasonable rates are essential, and discriminations, rebates, and unreasonable rates should and must be prohibited in order that we may have the fullest development of worthy and legitimate business enterprises.

All shippers, the small dealers, the large dealers, the small towns, the large towns, all cities, villages, farmers, and manufacturers, including every person and every community, should be treated alike. That is, common carriers should charge a like amount for like services under similar conditions. It is a question which vitally affects every line of business. The interests of the common carriers and the people are mutual and each is dependent on the other. The question should be dealt with judiciously, in a broad and intelligent manner, and in a spirit of justness and fairness to all concerned.

The railroad companies have rights and their rights should be respected and protected. But the people also have rights and are entitled to have consideration, and should and must be protected against the invasion of powerful and unscrupulous interests which compel them to pay, involuntarily, tribute to the common carriers, which in the aggregate amounts to hundreds of millions every year.

I am one of those who believe the common carriers have abused their power, and carried it to a point so as to absorb about \$1,000,000,000 as net profit every year. The real value of all railroad property is less than \$10,000,000,000, yet they absorb as net profits one-third, and it has been estimated as high as one-half, of the total increase of wealth of the United States. Only about 1 out of 22 employed in gainful occupation in the United States is employed in transportation services. The net profit from one day's labor in transportation is equal to one-half of the earnings of 22 in other occupations. Not that the employees in transportation get larger pay than those engaged in other occupations, but I am speaking of profits to the owners and operators of the various enterprises. The profit of \$1 invested in railways is equal to one-half of every \$9 invested otherwise.

Just think of it! Railroad property with a real value of less than one-tenth of all the wealth of the United States, employing less than 1,500,000 of the 29,000,000 people engaged in gainful occupation, earns as net profit an amount equal to one-third of the total increased wealth of the United States. Compare it with agriculture. Railroad property is valued at less than \$10,000,000,000. The value of all farm property, according to the Federal census report, is more than \$20,500,000,000. Five million seven hundred thousand families, or more than half of all the people, live on the farms. More than 10,000,000 are engaged in agricultural pursuits. The railroads employ 1 for every 8 employed on the farm, yet the railroads' gross receipts are equal to two-thirds of those from the farms.

The Interstate Commerce Commission's report shows the gross receipts of the railroads to be nearly \$2,000,000,000. The Department of Agriculture estimates the value of all farm products, except cotton, at \$2,700,000,000. To this add 12,000,000 bales of cotton at \$40 per bale, or \$480,000,000—all told, \$3,200,000,000.

But, as I before stated, I have not time to go into the details.

In view of this, and the various complaints coming in from all parts of this country, as to excessive, unjust, unreasonable, and dis-



criminating rates, which I believe are well founded, it is high time, and our duty, to give the desired relief. And as to that I think we are generally agreed. The question then is, How shall we obtain the best results? How shall it be done?

Congress as a body can not examine, investigate, and prescribe rates in detail, as that would be a physical impossibility; but it can delegate that power to some commission. I believe this power should be delegated to the Interstate Commerce Commission, a Commission I believe made up of men of integrity, intelligence, sound judgment, and who have had extensive experience, and who are more competent to deal with the questions than any new commission or tribunal. In fact, they are experts. If they were not such when appointed, they have become such through long service. They are men learned in the law. We have this Commission, maintaining it at a large expense; and as some one has suggested, it is now more ornamental than useful. In view of their experience, high standing, and ability, I believe this Commission should be given exclusive power, after full investigation and hearing, to determine and prescribe what to them seem just and reasonable rates.

At the suggestion of a member of the executive committee of the interstate commerce law convention I introduced a bill which has been referred to your committee, which provides that this power shall be conferred on this Commission. The bill was drawn by Mr. Call, of California, who is reported to have had much experience in cases before the Commission. My understanding is that the bill was drawn by him at the request of members of the executive committee of the interstate commerce law convention, and that the bill, if enacted into law, will carry into effect that which was contended for by that convention.

I take it from a statement made by this member of the executive committee of the interstate commerce law convention that this bill voices the sentiment of that organization, an organization which represents hundreds of boards of trade, business organizations, and State granges from all parts of this country; an organization ably represented by the worthy gentleman, Mr. Bacon, who has so earnestly and honestly put forth his untiring energy for many years to secure just legislation.

I understand that the features of this bill meet with his approval; that is, that if the Interstate Commerce Commission, upon investigation or hearings, finds rates to be unjust and unreasonable it shall establish a just and reasonable rate; that its findings shall be final, and shall not be subject to the review of courts, except for manifest violation or error of law; that when once determined by the Commission the rates are to take effect immediately, and that the Commission's rates shall not be suspended by reason of an appeal; that the rate or rates established by said Commission shall not be stayed, suspended, modified, or annulled otherwise than by said Commission in the establishment of a new rate or rates or by a final decree of a United States court of competent jurisdiction for manifest violation or error of law, giving to this Commission mandatory power; that is, power to enforce its findings.

What is the function of a judge? I understand it to be to interpret, to construe the law. The jury is called in merely to determine the merits or demerits of the claim and the amount to be awarded.

I have no special pride in any particular bill, just so that effective legislation can be had. We should legislate so as to meet this just demand of the people. I am not so particular about whose bill will be reported as I am to have some bill passed that will give the desired relief; and if the bill introduced by me can be improved upon, very well—and I believe it can—I will most cheerfully support it. If I had my way about it I would make it reach out further and deal with rebates, private cars, etc., but it seems to be the general opinion of the friends of the proposed legislation that these matters should be dealt with separately at a later date.

Personally I am willing to submit to their judgment in this respect.

I thank the committee for its indulgence and its kindness and courtesy extended to me.

The CHAIRMAN. Mr. Bacon will be recognized for the fifteen minutes that he expressed a desire to have.

#### STATEMENT OF MR. E. P. BACON.

MR. BACON. Mr. Chairman, it would be impossible for me, it would be impossible for anyone, in the limited space of time which has been allotted, to properly review the statements which have been made during the past two weeks of the hearings of this committee and the arguments which have been presented, the statements undoubtedly being intended to be correct and the arguments to be solid; but I see many inaccuracies in the former and many sophistries in the latter, and I really feel, gentlemen, that it is due to the interests which I represent—463 commercial organizations throughout the United States, scattered in every State in the Union with the exception of two, and two of the Territories of the country—to reply to many of these statements and arguments, and I humbly ask you to accord me on another day, to-morrow if possible, at least half an hour in addition to the time that I shall have on this occasion.

But I will present what I may be able to during these fifteen minutes that are assigned to me now, which I must do necessarily very hastily.

It has been questioned by some, and denied by others, that the power which we have been seeking to have conferred upon the Interstate Commerce Commission has ever been exercised by the Commission, although it has been stated frequently and authoritatively that it was exercised during the first ten years of its existence. I have been looking up the facts in the case for the purpose of presenting them to the committee, and I find that in December, 1896, a report was made by the Interstate Commerce Commission to the United States Senate, at its request, in pursuance of the following resolution:

*Resolved*, That the Interstate Commerce Commission be directed to transmit to the Senate a statement showing each case in which it has ordered any carrier or carriers subject to its jurisdiction to make any change in the classification of freight or in the rates charged for moving passengers or property, or any modification in the practices affecting such charges, and in connection with every such order; the classification or rates or practices in effect at the time when complaint was filed; those in effect at the date of the order; those directed to be placed in effect; those, if any, put in effect in compliance with such order, and those in effect at the present time in each case, as aforesaid, and the reason for their action in each case.

That resolution was adopted March 18, 1896. And then followed the report of the Commission, which I will file with the committee,

dated December 21, 1896. In that report appear 69 cases which were decided by the Commission while Judge Cooley was a member of the Commission, and in which he participated during the period of his service. The last year of his service he was largely incapacitated and did not participate in decisions rendered after the 16th of May, 1891, the organization of the Commission having been April 5, 1887. In a little over four years, with his participation, 69 cases were decided in which rates or classification or practices affecting rates were ordered to be changed by the Commission, and they appear in detail in this statement of the Commission to the Senate. Commissioner Schoonmaker, who was one of the original Commissioners, participated in 59 of these 69 cases, from April 5, 1887, to November 30, 1890. From Judge Cooley's retirement until August 21, 1896, five and a quarter years, there were 63 cases decided by the Commission of the same class, each of which involved the particular rate complained of or a classification or some practice or regulation affecting the rate. And I will say that during the first four years the report of the Commission states that most of the orders were complied with, and during the subsequent period a considerable number of them were complied with. But during the latter part of the ten-year period, during which this power was exercised, the compliances grew less and less; and since the decision of the Supreme Court in 1897 that that power was not conferred upon the Commission specifically by the original act the Commission has refrained from issuing orders of that character.

Among those cases I wish to cite one which was of a very extensive character. The Chamber of Commerce of Minneapolis *v.* The Great Northern Railroad et al., decided January 3, 1893, is a case in which the Commission ordered that from certain described territory in North Dakota and South Dakota the rates on wheat should be 1 cent per hundred pounds less to Minneapolis than to Duluth. This was a decision affecting the relation of rates wholly, not the rates themselves. In certain other territory  $1\frac{1}{2}$  cents less; in a certain other territory 2 cents less; in certain other territory 5 cents less. With some modifications agreed upon by the parties to the case these differentials were promptly put into effect, and it covered hundreds of shipping points in the two States mentioned to Minneapolis and Duluth. I am unable to state the exact number, but from personal knowledge, my business relations lying in fact largely in that territory, it was a very large number; I know that it covered several hundred, probably not less than two or three hundred points.

I offer these statements to show the correctness of the statement which has been made repeatedly that the Commission did exercise this power. Now, the fact that it did exercise it I do not put forth as a reason that it should be conferred upon the Commission now, but as evidence that with the exercise of that power, with the continued and frequent exercise of it, no complaint arose as a result of such action.

Mr. STEVENS. I see that it did in that case. In that case the Chamber of Commerce of Minneapolis asked that the rate should be discontinued.

Mr. BACON. With all respect, Mr. Stevens, I think you are misinformed.

Mr. STEVENS. That is the information I have gotten from a very

good source. I did not want to interrupt, but I do not want any misapprehension about it.

Mr. BACON. Let me say that to my certain knowledge those differentials are in force now and have been from that time to the present; they are in effect to-day, and have been since the agreement between the respective parties in relation to the modification.

Mr. STEVENS. The information I get is from the Chamber of Commerce of Minneapolis, stating that they have asked that the differentials be discontinued, for the reason that if the same policy were pursued Minneapolis would get no advantage from the southwestern trade and Duluth would get all the advantage from the northwestern trade.

Mr. BACON. I beg respectfully to state that you are misinformed. I am entirely familiar with the facts in this case. There are certain points in the Southwest where the Minneapolis people desire to have a more favorable differential than now exists, but in North and South Dakota the differentials established at that time are entirely satisfactory and are being observed, and I will say that the Minneapolis people would not have them abrogated or interfered with for any amount of money. I will say in this connection that I am engaged in the commission business, in the handling of grain, and I have a branch office at Minneapolis and a branch office at Chicago, my main office being in Milwaukee. I also have a branch office at St. Louis. So I am conversant from day to day with all the workings of the rates on grain from the territory in question.

In this connection I wish to read a memorandum which I made, in order to be more condensed and concentrated in reference to this report to the Senate.

(Referring to memorandum.)

The accompanying pamphlet is a printed report to the Senate of the United States in response to a resolution of the Senate of March 18, 1896. This report contains a statement of the cases, arranged according to the dates of the decisions, in which changes in rates, freight classification, or practices affecting transportation charges had been ordered by the Commission up to December 21, 1896.

The orders shown on the first 20 pages were all issued during the period between April 5, 1887, the date when the Commission was organized, and January 12, 1892, when Judge Cooley's resignation took effect. Judge Cooley does not, however, appear to have participated in any order after May 16, 1891. An order of that date appears on page 18 of the report mentioned.

An examination of the record of cases in that report shows that regulating orders were made during the first year of the Commission's existence, in which the following powers were exercised:

First. Reducing rates found to be unreasonable under the first section of the act, and prescribing a maximum charge for the future. In the case of *Evans v. The Oregon Railway and Navigation Company* (1 I. C. C. Rep., 325), decided December 3, 1897, the defendant carrier was ordered to cease and desist during the present grain season—that is, ending the 30th of June, 1888—from charging or receiving more than 23½ cents per hundred pounds, or \$4.70 per ton, on wheat transported over its railroad lines from Walla Walla, Wash., to Portland, Oreg. The rate at the time the complaint was filed was 30 cents per hundred pounds, or \$6 per ton, and when the order was

issued the rate was 25 cents per hundred pounds, or \$5 per ton. The order reducing the rate to  $23\frac{1}{2}$  cents per hundred pounds was complied with.

Second. Prescribing a definite and certain relation of rates as between different localities to be observed in the future. In the case of the Board of Trade Union of Farmington *v.* Chicago, Milwaukee and St. Paul Railway (1 I. C. C. Rep., 215), decided November 1, 1887, the Commission ordered that while the defendant charged a rate of  $7\frac{1}{2}$  cents per hundred pounds from Minneapolis and other points on its River and La Crosse divisions to Milwaukee, Chicago, and other points in Iowa and Illinois on wheat, flour, and mill stuffs it must not exceed a rate of 10 cents per hundred pounds, or a difference of one-third of the amount on the lesser charge, for transporting the like kind of property to the same points from Farmington, Northfield, Faribault, and Owatona, Minn. Rates of 15 and  $13\frac{1}{2}$  cents were in effect when the complaint was filed and when the order was issued. The order was complied with.

Third. Prescribing a like definite relation in rates for the future as between different commodities. In the case of Reynolds *v.* Western New York and Pennsylvania Railroad Company (1 I. C. C. Rep., 393), decided January 13, 1888, the defendants were ordered to cease and desist from charging more for the transportation of railroad ties from points in Pennsylvania to Salamanca and Olean, N. Y., than they charged for the transportation of lumber between the same points. The order was complied with.

The forms of these first orders as they were entered at the time were closely followed by the Commission in all subsequent decisions. During the first year after the Commission was organized petitions for reductions in rates were dismissed, not for want of authority to grant the relief prayed for, but because the proofs, or want of proofs, failed to make a case against the carriers complained of. The powers thus exercised by the Commission were as extensive in the direction of prescribing rates for the future as any that were attempted by the Commission in later years.

The cases above cited are only examples of orders issued by the Commission and shown in the report mentioned while Judge Cooley was a member of the Commission, and, as above indicated, he joined in authorizing the issuance of these orders.

A case decided by the Commission in an opinion by Commissioner Schoonmaker has sometimes been referred to as holding in 1887 that the Commission had not authority to prescribe reasonable rates. This was the case of Thatcher *v.* Delaware and Hudson Canal Company (1 I. C. C. Rep., 152), decided July 25, 1887. That case, however, did not involve the reasonableness of rates. The avowed object of that proceeding was to compel the application of proportions of through rates to reshipments from Schenectady, N. Y., to Boston and Boston points. The decision made rests upon the ground that the change desired would make the rate from Schenectady less than from intermediate stations between Schenectady and Boston and would thus bring about a conflict with the fourth section, unless the carrier should voluntarily reduce the rates from the intermediate stations. There was no complaint in that case that the rates from intermediate stations were unreasonable, nor was there any evidence upon that point. In this connection the

Commission used the language which has sometimes been referred to as disclaiming the power to prescribe a reasonable rate on complaint. The Commission said, as to rates from the shorter-distance stations, concerning which no complaint had been made and no evidence offered:

It is therefore impossible to fix future rates in this case, even if the Commission had the power to make rates generally, which it has not. Its power in respect to rates is to determine whether those which the roads impose are for any reason in conflict with the statute.

It was impossible to fix rates from the shorter-distance stations because the Commission had before it no complaint or any evidence; and if it had power to make rates generally, that is, without complaint or evidence, it could not have done so in the absence of some information on the subject. At that time, if the rates were found to be in conflict with the statute, it was believed that the Commission had authority to prescribe the maximum reasonable rate, and it soon afterwards exercised that authority, namely, in the case of *Evans v. Oregon Railway and Navigation Company*, above cited. In the *Thatcher* case, above mentioned, the Commission said:

If the complainant thinks the rates from Schenectady and intermediate points to Boston and Boston points are excessive, he can raise that question directly and distinctly, and the Commission can then enter upon a full investigation of the facts bearing upon it.

It is proper to add that up to the time the United States Supreme Court decided the *Maximum Rate* case (167 U. S., 478) in May, 1897, the Commission exercised on every needful occasion the authority to prescribe rates for future observance by the carriers. The last case in which that authority was exercised was in the *Milk Producers' Protective Association v. D. L. and W. R. R. Co. et al.* (7 I. C. C. Rep., 92), decided March 13, 1897. In that case the Commission found the existing rates upon the interstate transportation of milk to New York delivery points unreasonable, unjust, and unduly prejudicial and disadvantageous to producers and shippers, and fixed certain group rates for such transportation. This order was complied with by the different carriers.

I have also had a statement drawn off showing the cases in which the courts have refused to enforce the orders of the Commission, which is as follows.

In the following cases the courts refused to enforce the order of the Commission from the date of its organization to January 14, 1905:

|   |                    |
|---|--------------------|
| * 1. <i>Ky. and Ind. Br. Co. v. L. and N.</i> ..... | 37 Fed. Rep., 567. |
| * 2. <i>I. C. C. v. B. and O.</i> .....             | 145 U. S., 263.    |
| * 3. <i>I. C. C. v. A. T. and S. F.</i> .....       | 50 Fed. Rep., 295. |
| 4. <i>I. C. C. v. L. V.</i> .....                   | 74 Fed. Rep., 784. |
| * 5. <i>I. C. C. v. D. G. H. and M.</i> .....       | 167 U. S., 633.    |
| * 6. <i>Fla. Fruit Exch. v. S. F. and W.</i> .....  | 167 U. S., 512.    |
| * 7. <i>I. C. C. v. Tex. and Pac.</i> .....         | 162 U. S., 197.    |
| 8. <i>I. C. C. v. N. Y. P. and N.</i> .....         | Never reported.    |
| * 9. <i>I. C. C. v. L. and N.</i> .....             | 73 Fed. Rep., 409. |
| * 10. <i>I. C. C. v. E. T. V. and G.</i> .....      | 181 U. S., 1.      |
| * 11. <i>I. C. C. v. W. and A.</i> .....            | 181 U. S., 29.     |
| * 12. <i>I. C. C. v. Clyde S. S.</i> .....          | 181 U. S., 29.     |
| * 13. <i>I. C. C. v. Clyde S. S.</i> .....          | 181 U. S., 29.     |
| * 14. <i>I. C. C. v. Ala. Mid.</i> .....            | 168 U. S., 144.    |
| 15. <i>I. C. C. v. D. L. and W.</i> .....           | 64 Fed. Rep., 723. |
| * 16. <i>I. C. C. v. C. N. O. and T. P.</i> .....   | 167 U. S., 479.    |
| * 17. <i>Behlmer v. L. and N.</i> .....             | 175 U. S., 648.    |

|   |                     |
|---|---------------------|
| *18. <i>I. C. C. v. N. E. R. Co. of S. C.</i> ..... | 83 Fed. Rep., 611.  |
| *19. <i>Colo. F. and I. Co. v. So. Pac.</i> .....   | 101 Fed. Rep., 779. |
| *20. <i>I. C. C. v. So. Ry.</i> .....               | 105 Fed. Rep., 703. |
| *21. <i>I. C. C. v. So. Ry.</i> .....               | 105 Fed. Rep., 703. |
| *22. <i>I. C. C. v. L. and N.</i> .....             | 190 U. S., 273.     |
| *23. <i>Brewer v. Cent. of Ga.</i> .....            | 84 Fed. Rep., 258.  |
| *24. <i>Farm. L. and T. Co. v. N. P.</i> .....      | 83 Fed. Rep., 249.  |
| *25. <i>I. C. C. v. C. B. and Q.</i> .....          | 186 U. S., 320.     |
| *26. <i>I. C. C. v. N. C. and St. L.</i> .....      | 120 Fed. Rep., 934. |
| *27. <i>I. C. C. v. So. Pac. (Kearney)</i> .....    | Not yet reported.   |
| *28. <i>I. C. C. v. So. Ry.</i> .....               | 122 Fed. Rep., 800. |
| *29. <i>I. C. C. v. C. P. and V.</i> .....          | 124 Fed. Rep., 624. |

It should be noted that of these 29 cases 25 went off not upon questions of fact, but upon proper construction of the law. These 25 cases are marked with a star. The Cattle Raisers' case, marked with a dagger, was referred back to the Commission by the Supreme Court.

In the following cases the courts enforced the order of the Commission:

|   |                     |
|---|---------------------|
| 1. <i>I. C. C. v. C. N. O. and T. P. R. (partially)</i> ..... | 162 U. S., 184.     |
| 2. <i>City of St. Cloud v. N. P.</i> .....                    | Not reported.       |
| 3. <i>Tileston Mill Co. v. N. P.</i> .....                    | Not reported.       |
| 4. <i>I. C. C. v. L. and N. (naval stores)</i> .....          | 118 Fed. Rep., 613. |
| 5. <i>I. C. C. v. So. Pac. (oranges)</i> .....                | 132 Fed. Rep., 829. |
| 6. <i>I. C. C. v. L. and N. (Tifton, Ga.)</i> .....           | No decision.        |

In the Tifton case defendants complied with the order of the Commission after suit was brought in the court.

The CHAIRMAN. The time of the gentleman has expired.

Mr. BACON. I respectfully beg that the committee will take into consideration my request that I be allowed a half an hour more to-morrow morning.

Mr. TOWNSEND. Won't you put in what you have there?

Mr. BACON. I will put in the decision of the Supreme Court in the case of *Smythe v. Oliver Ames et al.*

That the vested rights of railway corporations, and their immunity from the operation of legislative action that would be unjust to their rightful interests, are amply protected by the provisions of the Constitution of the United States has been definitely settled by recent decisions of the Federal courts, notably by the decision rendered by the Supreme Court on March 7, 1898, in what is known as the Nebraska Railroad Commission case, entitled "*Smythe v. Oliver Ames et al.*" The opinion of the court, delivered by Justice Harlan, declares:

"It is settled that a State enactment, or regulations made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the Constitution of the United States. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is therefore under governmental control, subject, of course, to the constitutional guarantees for the protection of its property. A corporation maintaining a public highway although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against the exaction of unreasonable charges for the services rendered by it; but it is equally true that the corporation performing such public services, and the people financially interested in its business and affairs, have rights that may not be

invaded by legislative enactment in disregard of the fundamental guaranties for the protection of property."

The principle enunciated in this decision regarding the constitutional limitations of legislation by a State is, of course, equally applicable to Congressional enactment.

Thereupon, at 12 o'clock, the committee took a recess until 2 o'clock p. m.

AFTERNOON SESSION.

The committee reassembled at 2 o'clock p. m., pursuant to the taking of recess, Hon. William P. Hepburn in the chair.

**STATEMENT OF HON. JUDSON C. CLEMENTS, INTERSTATE COMMERCE COMMISSIONER.**

Mr. CLEMENTS: Gentlemen, I am very much obliged to you for the opportunity of saying a few things this afternoon, and I will promise not to detain you long. It is not my purpose to undertake a general discussion of the questions that are pending in the different bills or the general subject of railway regulation to any considerable extent. I felt impelled to ask the privilege of coming here mainly because of some things that have been said in regard to the manner in which the Commission has endeavored to enforce the law or perform its duty, and in respect to the decisions that have been made by the Commission and reviewed by the courts; and only from a sense of justice and self-respect do I feel justified in trespassing upon your time in asking for this opportunity.

I shall take up first the charge, as I may call it, which has appeared in one form and another here and elsewhere, to the effect that the Commission has not properly endeavored to enforce the provisions of the present law against rebates and various forms of secret discriminations, and which has been used as an argument against investing the Commission with other powers.

To begin with, I call attention to the fact that those who accuse the Commission of dereliction in this respect are the representatives of corporations that inaugurated and maintained these reprehensible practices; and you are asked in effect to discredit the Commission at the instance of those who have broken the law. Now, let us look at the facts. The Commission has instituted numerous general investigations when it has had reason to suspect deviations from the published rates, discriminations, cut rates, etc., in various localities all over the country. It is a matter of general public knowledge that that has been so. In 1902 some important inquiries were made, one with respect to grain rates from the West—from Chicago and other points in the West—to the seaboard, and in the same year another one in respect to packing-house products; and notwithstanding the Commission had on previous occasions inquired into these matters and put traffic men on the stand and had been unable to develop what it was informed in one way and another was the true situation—that is, that the law was violated—it turned out during these investigations that there was a general owning up by the carriers to violations of the law.



You have had printed here at various sessions full testimony in which one traffic man after another appeared on oath and acknowledged that there was a general practice of cutting rates and giving rebates, sometimes one form and sometimes another, both in respect to packing-house products and grain—not occasionally, but by wholesale and generally. These inquiries were instituted by the Commission, and this condition was developed. The testimony in these cases was referred to the Department of Justice with the request that proceedings be instituted for the purpose of suppressing these violations of law. The result was that a number of injunctions were obtained against the principal carriers, not all. It was not then known that an injunction would lie on behalf of the public against a practice of this sort. It was disputed by able lawyers, it was a question of doubt; and the proceedings were confined to some 12 or 13 leading roads as test cases, and also with the idea that if the law was found to be so that they could be enjoined and were enjoined that the moral effect of it would be to admonish the others, and then they could be enjoined or not as it might be found necessary. So those injunctions were obtained under proceedings instituted by the Attorney-General, or under his direction, at the request of the Commission in respect to these matters. The injunctions are still running against those roads, and they are under injunction to-day.

It is the universal testimony, not only of railroad men, but shippers, that since those investigations and disclosures and the publicity that was given to them through the press and otherwise, and the injunction proceedings were instituted and maintained, that practice of directly cutting the rate or paying rebates has very largely disappeared. It has been corrected, and that is the universal testimony, there is no doubt about it. I do not mean to say that there are not violations of the law here and there, as there are violations of other laws, and as there always will be. You have never been able to suppress counterfeiting or theft or any other crime entirely; but with great effect and success these practices of paying rebates and shipping at cut rates, deviations from the published rate, have disappeared in the last two or three years as the direct result of these investigations, the publicity, and the exposure and the injunction proceedings which have been had. These were not all. I mention them because they occurred about the same time. I will say more; that it was a shameful condition, and was acknowledged by the carriers and by the public as intolerable, and it resulted in the passage of the law known as the "Elkins bill."

This is not all. The Commission has encountered great difficulties at every step. It has had general investigations of practices of the same sort at Minneapolis and at St. Paul in respect to flour. It was difficult to obtain testimony. It always had been before these hearings were had. As far back as 1892, when the Commission was undertaking to develop these matters, it encountered this difficulty. Mr. Counselman objected to testifying in regard to rebates, because to do so would incriminate him. Notwithstanding there was a provision in the act to regulate commerce that the testimony should not be used against the witness he objected. The Supreme Court held, notwithstanding that provision, that he was entitled to the exemption, and

that the only way a witness could be compelled to testify in such a case was to give him absolute immunity from prosecution. Then, to meet that, and to enable the Commission to proceed and obtain facts at all in respect to such matters—because it was only the parties that were guilty of the offense that knew about it—Congress promptly passed, in 1893, an act complying with the suggestion of the Supreme Court, giving immunity to a party when he testifies in respect to these cases.

Very soon after that the question was again taken to the Supreme Court, under the new law. It was said this act did not afford complete protection, that the witness was entitled to immunity from the exposure it would subject him to; and, after a course of litigation and appeal, the Supreme Court sustained that act, and since that time the fact that it may incriminate a party is no reason why he shall not be compelled to testify in regard to these matters. So you see it took a long time to get that question settled. Again, in the Brimson case, in Chicago, where we were investigating the facts in connection with the Illinois Steel Company, objection was made to producing books and charters and papers in the possession of the company on the ground that the Commission had no right under the law to institute a general inquiry of this kind.

It was said that the Commission was not a grand jury, and therefore could not ask the legitimate question of a witness except in a case where there was an issue, where there were parties, complainant and defendant, and an issue that it had the jurisdiction to try. So, there we were confronted with that question, not that it would incriminate them to answer, for that had been settled, but simply that the Commission could not institute such an inquiry, could not conduct it. It is true the law said in terms that we could, but they said the law was invalid, that it was unconstitutional. So, after a course of appeal that went to the Supreme Court, by a majority of one that case was decided in favor of the power of the Commission to conduct such an investigation.

Only last year, when we were investigating, upon complaint, the anthracite-coal roads in New York, a general objection was made again to the production of books and papers, and we had to stop proceedings and go into court, and then the case was appealed to the Supreme Court. Though the circuit court decided against the Commission, the Supreme Court fully upheld the position taken by the Commission and ordered production of the documentary evidence.

Only last fall in Chicago, when we were investigating the private car line practices under a general inquiry, a witness who represented a car company was asked whether his company paid rebates or not. He refused, under advice of his lawyer, to answer. We had to suspend that branch of the case and institute a proceeding to compel him to testify. That proceeding is pending now in the circuit court.

Thus it is seen that the Commission has been steadily confronted at every step with difficulties and constitutional objections and refusals to answer, necessitating resort to courts and appeals to the highest court in the country to decide these questions. And yet the gentlemen under whose management these abuses have been committed are the gentlemen who come here and tell you that the Commission is not to be trusted because it has not enforced the law against them.

There would be no need of enforcing the law if they were to hold that their obligations under the law were first and highest and above the pecuniary interests of the companies which they represent. They say: "Well, I must pay rebates because my competitor does. I must commit an offense because my competitor commits one, or I will lose business. I will get the business by violating the law, and therefore I must violate it."

I do not know of any code of ethics or code of morals that sustains an argument of that sort with respect to any other business in the land—that I must do as somebody else does for fear he will get ahead of me, irrespective of what the law says about it. Now, I admit as a practical question the traffic man is confronted with a great difficulty when his business is being taken away by another road that violates the law. I see the force of that; it is a serious condition. But it would be far better if all of them who are affected in this way would combine to try to obey and enforce the law rather than to follow the bad example of a competitor and violate it. But what I protest against is that these gentlemen who have instituted and maintained these practices shall stand here to impugn this Commission for dereliction and failure in an effort to perform its duties under this law and to compel them to obey it.

I do not criticise the carriers for exercising their right to raise the questions that they have in these proceedings. My point is that when they stand upon their confessed violations of law they occupy a sorry position from which to discredit the Commission for failure to enforce upon them obedience to laws, especially in view of the fact that they have in every way contested the authority of the Commission to require the disclosures necessary to that end.

Now, railroad men are no worse than other men; they are no better; they are actuated by the same motives that other people are actuated by. These gentlemen who represent these corporations that are in this business for gain, confessedly so, represent the interests of the owners. They do not pretend to represent the public.

The Northern Securities matter was first investigated by the Interstate Commerce Commission under a general inquiry. It was the taking of testimony before the Commission that was a basis, a foundation, for the proceedings that were carried to the Supreme Court and resulted in the dissolution of that unlawful combination. The joint traffic agreement between the 31 railroads in the trunk-line territory a few years ago, when they had signed an agreement, was taken up by the Commission and investigated, and it was upon request of the Commission that proceedings were instituted by the Attorney-General to enjoin and break it up, and which resulted in the dissolution of that combination by injunction.

It was the investigation of the Commission only a couple of years ago in southern territory, where it was alleged that the roads carrying cotton in that section were reserving the routing to themselves and dividing the traffic—it was the investigation of the Commission and the request of the Commission that caused the institution of proceedings at Atlanta and Memphis and the breaking up of that practice. It was the general investigation of the Commission last fall which developed the practices of so-called "industrial lines" in Chicago and other places where, by securing an undue amount of the through

rate, the manufacturer for a small trackage about his works obtains an equivalent to a rebate. As a result of this investigation, some of these practices have already been abolished. It was the general investigation of the Commission that developed the abuses of kindred character in respect to the private car lines receiving allowances from the railroad and paying rebates to some shippers and not to others.

The Commission has not been idle. It has been confronted with a contest at every step it has made from the beginning by these gentlemen who impugn it and against whom it has been sought to enforce the law. A sense of justice, a feeling of self-respect, forbids the Commission to stand idly by and let it go as confessed that we have not been attempting to do anything, and that there should be no regulation as to the reasonableness of rates because the Commission has not been able to induce the very men who make the arguments to cease and desist from other violations of the law, such as hurtful and ruinous discriminations as between individuals, commodities, and places.

I have no animosity toward the railroads. The decisions of the Commission—those in which I have participated—are matters of public record. The facts upon which we have rendered decisions are printed. They are in the reports, and these cases are open to investigation. There has been no crusade against the railroads by this Commission. The crusade is the other way. The law enjoins upon the Commission the duty of making a report once a year to the Congress, including therein its recommendations for amendment of the regulating statute. It has never failed to perform that duty as it has understood it. The breaking down of this law in the effort to enforce it at different points has made it necessary for the Commission to do that, to emphasize it, and to repeat it time after time. Of course, it would be easy to remain passive, have an easy job, and draw the salary, and pay no attention to the sworn duties and obligations which rest upon the Commissioners.

But we would be unworthy of your confidence if we did that. And not having done that, every time the Commission has made a report recommending any important amendments to this law which affects the carriers, and which they do not approve of, the Commission has been attacked in various ways.

It has been asserted that we want autocratic power. Only last year the Senate called upon the Commission for certain data and information in regard to increases of rates, which it answered as soon as it could compile the testimony, and that special report became a public document. A gentleman in Chicago, Mr. Slason Thompson, who is the manager of the press bureau of a railroad organization, has put forth a criticism of that report which is longer than the document itself, and which begins with this statement:

January 13 last, presumably at the suggestion of the Interstate Commerce Commission, in furtherance of its campaign to obtain autocratic control of American railroad transportation, Senator Quarles introduced in the United States Senate and asked the present consideration of the following resolution.

There the Commission and the Senator who introduced it are most unwarrantably characterized as joining in a campaign for what? Autocratic authority for the control of all American railways. And what is the offense? The Senator introduced a resolution calling on

us for certain data and information in respect to the increase of railway rates during the last three or four years, and the effect of those increases. We made the best answer we could from the data we had, and the Senate published the document. That is the way it is handled and the way we are criticised by a representative of a large number of these carriers.

Now, I want to pass away from that, for I am here, as I said before, to repel these unjust insinuations or charges, in whatever form they have been presented, and to give to you the evidence of the activity of the Commission in its efforts to bring these concerns into obedience of the law.

Mr. H. L. Bond was before the committee a few days ago, and I saw in the newspapers, although I have not had a chance to read the corrected or revised report of his statement, that he said, in respect to what he considered the impropriety of conferring any power to fix rates upon the Commission, after naming twenty-five or thirty cases that had gone to the courts—to use his elegant language—"The Commission had hit the bull's-eye once, had struck in the ring twice, and had missed the target altogether the other 23 times," or whatever the number was. Now, I only refer to that because stated in that way it is misleading.

Out of the 35 cases that the Commission has had occasion to bring in court for the enforcement of its orders, some five or six of them were cases in which the courts enforced the orders of the Commission. In the other cases they did not. But why not? That is the material matter to which I wish to call your attention. Nearly all of these other cases in which the courts have not enforced the orders of the Commission were either where the Commission found a rate unreasonable and undertook to say what was the reasonable rate and prohibited the charging of any more than the reasonable rate, and made an order to that effect, or they were cases (of which there were a large number) under the long and short haul clause, or fourth section of the act, where the Commission announced and followed a construction of that clause to the effect that it was obligatory upon the carriers, except when they made a special case under an application to the Commission for leave to depart from the rule of that clause or section. So that as to all those cases Mr. Bond refers to them in such a way as to imply that the Commission was reversed on the merits of those cases, while as a matter of fact the Commission was reversed upon the construction or interpretation of the law in respect to the fourth section and the power to fix a maximum rate.

I am not here to criticise the ruling of the Supreme Court on these questions; but it is a fact that no railroads ever, before the interstate-commerce law was passed or since, desired or did charge more for the short haul than for the long haul except to meet competition at the longer-distance point. That was the only occasion for it. Now, it has been held that where competition does exist at the farther point and does not at the nearer point, or where greater competition does exist at the farther point than at the nearer point, that the circumstances and conditions are substantially dissimilar, and therefore that the long and short rule does not apply. However it has been brought about, that section is as much a nullity as if it had never been written.

Now, I am not criticising the court about that. There may well have been fault in framing the section, because that section is only operative where the "circumstances and conditions are similar," and right there in that phrase the difficulty has arisen. The Commission was trying to give some effect to the section; was assuming that Congress meant to correct something by the fourth section; but under the construction given to that section by the court only one of its long and short haul clause orders have been enforced. It is perfectly evident that the law might just as well have never been written as to have it mean what it now means, for it has no effect whatever.

In respect to the power to deal with the rate the Commission from its very inception construed the law to mean that when a rate was challenged and the question was tried, and upon hearing the rate complained of was found to be unreasonable, the Commission could find what was reasonable, and could prohibit the carrier from charging any more upon the apparently good reasoning, it seems to me, that any part of the excessive rate above that which is reasonable is just as unlawful as any other part. If the reasonable rate is 90 cents and the unreasonable rate is a dollar, and you have power to order the carriers to cease and desist making an unreasonable charge, why does not the same apply to any other part of the excess as well as the one hundredth cent? Why not apply it to the ninety-fifth or the ninetieth, or any other part above the reasonable rate? That is what the Commission was trying to do. That is what the Commission held from the beginning, when Judge Cooley was its chairman, and it made rates at that time, and continuously thereafter until the Supreme Court said that the power was not conferred upon the Commission by the statute.

A large number of these cases (25, I think) that Mr. Bond cites as indicating the incapacity of the Commission, so to speak, are simply cases that were overturned in the way of undertaking to enforce the law as it was construed from the beginning; and whatever may be the law now, whatever may be the rightfulness of the interpretation which the courts have placed upon it, the very situation that confronts you here to-day is a vindication of the desire of the Commission to enforce a reasonable or just rate. It is because of such interpretation that this clamor for amendment exists, so that it is not fair to array these cases here as cases in which the court upon the facts, upon the merits and equities and justice of the case, has overturned the Commission 29 or 30 times out of 35, when in reality these cases went off solely upon construction of the law, which demonstrated vital defects in this regulating statute. In the various judicial proceedings to which I have referred the Department of Justice has cooperated with the Commission and acted with commendable promptness and efficiency in the expedition and conduct of the cases.

Now, I have said about all I intended to say in respect to these matters. There are one or two general observations I want to make. It was said the other day by Mr. Staples, a member of the railway commission of Minnesota, before the Senate committee (and there is no impropriety in my alluding to it, because it appeared in the newspapers) that this Commission has had a case before it for a long time from a place called Cannon Falls, in Minnesota, involving a discrimination in rates. That is a long and short haul case. The

testimony was taken about a year ago by the Commission, and it has been set some two or three times for argument before it was finally submitted. It was either postponed on the request of the attorney representing the complainant or by his consent and the request of the other party—

Mr. STEVENS. When did the last brief come in?

Mr. CLEMENTS. The brief on behalf of the complainant was filed the 5th or 6th of this month. The Commission has had that case, then, three weeks. The delay has largely resulted from the action of counsel representing the complainant, either on his own motion for his own convenience or in conjunction with counsel representing the other side. Now, Mr. Staples never intended to indicate that this Commission was at fault; I have no idea that he did. What he was undertaking to do was to show the defective state of the law as to the long and short haul cases. That is what I believe was his intent and meaning. I think he was entirely misunderstood, and I think it is due to him and to us that this fact be stated on account of the publicity that was given to his statement.

It is continually said that it is all right to stop rebates, stop the cutting of rates, stop these disastrous and ruinous secret discriminations; all these gentlemen say that those things ought to be stopped. But then they will tell you in the next breath that such a thing as an unreasonable rate is a thing of the past; that there is no need of any law about that because there are no unreasonable rates. Well, there may not be—I am not here to try rates to-day—but what I want to say about that is this: The present law proceeds upon the idea that the shipper has a right to reasonable and just rates. If he has, there ought to be some way of ascertaining whether he has a reasonable or just rate, and to give it to him if he has not. If he has no rights in the premises, if transportation is a commodity like a horse or a hat to be sold under any terms and with any discrimination the owner pleases, then we ought to wipe out the law we have now. It has no place here, if that is the true theory. If, however, the law we now have properly declares every rate is unlawful which is not reasonable and just, and that the public is entitled to a reasonable and just rate, there ought to be some process whereby it can be ascertained and enforced.

These gentlemen say this is revolutionary, radical, reactionary. I do not know how many adjectives have been used in respect to it. It appears to me that it is just the other way, that it is a curious anomaly that where two parties have rights involved and the law provides that the question may be put in issue by complaint and answer, with a trial and investigation, that the whole matter must end finally by allowing one of the parties to decide the question. There is no affective way now in which to revise and correct a rate and put in a different one if the existing rate is unreasonable, no matter how unreasonable it may be. To say that the Commission may say that a dollar rate is unreasonable, and therefore unlawful, and make its order to that effect, subject to a trial de novo and the taking of new testimony, when all of the traffic managers can come in and give testimony as experts that the rate in question is a reasonable one, certainly seems to me an anomaly.

There is no way within a reasonable time that the matter can be

settled and the reasonable rate made effective. There has never been a time since the dawn of civilization, at least since the establishment of common law, that one of the parties in a matter in controversy is left by the conditions of the law to determine for himself what shall be the other party's right in the matter. But then we are told, in answer to that, that the interests of the carriers are so dependent upon the just interests and prosperity of their patrons that they will not kill the goose that lays the golden egg, and therefore their own selfish interests will promote the application of just rates for their patrons. This, of course, is mere evasion. In respect to no other matter do we proceed upon the idea that we can safely leave the just right of one person to be determined by the interests of the other party in the controversy.

The CHAIRMAN. Would it interrupt you if I should ask you a question there?

Mr. CLEMENTS. No, sir.

The CHAIRMAN. What is the method pursued by the Commission in ascertaining what is a reasonable rate? To what factors, what circumstances, do they look—how do they get at it?

Mr. CLEMENTS. Well, the Commission considers such testimony and facts as it may get relating to many matters, among which are the bulk of the article as compared with its weight and its value, how much space it will take up in a car as compared with its weight and its value, the length of the haul, the value of the article, the service of the carrier, and also the question of competition. In addition to that it considers what the traffic will bear. You can not put the same rate on low-grade freight as you can put on high-grade freight. For instance, you can not put the same rate on sawed logs that you can on dressed meat, which is a higher grade article. Value is necessarily an important factor.

The CHAIRMAN. Is there any mathematical method of determining it?

Mr. CLEMENTS. There is absolutely none, I think. There is no method by which you can work out to a mathematical demonstration that a particular figure is a just and reasonable rate. You can not do it, because you can not count the cost of the traffic to the carrier for its movement. There are many elements that you can not figure; they are only estimates. That is the utmost that the railroads undertake to do in considering these matters. It is one of those questions that, in my judgment, are not susceptible of any such fine measurement as the calculation of interest on a note. As with many other questions, however, we get into court where there is a controversy between persons, and the question submitted to the jury by the court is, What is reasonable under all the circumstances? Nobody can figure on it to a certainty, and nobody can prove it by any rule, but human conscience, human judgment, with comparison of all material things involved, are to be used.

Take, for instance, the matter of freight classification. Classification, to be of any benefit, must group together all of one class. The roads in some territories have six or seven classes, and in other sections eleven, and so on. Take either one of them, and when you put the eight or ten thousand articles of commerce that move into these different classes you have to group together in one class several hundred articles.



They all differ in greater or less degree—in value, in bulk, in weight, and in their susceptibility to injury from water or breakage, and all these things. It is a greater risk to haul glassware, cut glass, and things like that, than it is to haul pottery, because the loss is greater when the breakage or damage comes. The best that can be done by human ingenuity and human methods, in my judgment, or ever can be done, is a fair and reasonable approximation in respect to these things.

The CHAIRMAN. Conjecture?

Mr. CLEMENTS. It amounts to more than a conjecture, perhaps. Conjecture is not much more than a guess, I should think. There are some of these things—you see them, you know them, they are substantial elements that you must consider—but you can not measure them.

The CHAIRMAN. Is it always proper in fixing a rate to ascertain, if possible, whether it will be remunerative to some degree?

Mr. CLEMENTS. That is what we have always thought was necessary, to find that the traffic paid something more than the cost of moving. Otherwise it would be carried at a loss, which loss would have to fall upon some other traffic and would be an unjust discrimination. So we have always regarded it as a wholly unjustifiable thing for a carrier to carry at a loss. It can not be done without injustice to some other traffic.

The CHAIRMAN. Well, there would be a difference, I suppose, between carrying at a loss and carrying at a remunerative rate?

Mr. CLEMENTS. Yes. The carriers as a rule say that they had better carry a thing that will pay the cost of movement and something more rather than not to carry it at all, although it does not pay enough to support the cost of the movement and pay its proportion toward the fixed charges and expenses of the plant. And undoubtedly there are many things that do move at less than a remunerative rate, if you take into account the fair proportion which that traffic should bear of all the expenses of maintaining the road and operating it, and paying fixed charges. There is no doubt about that. If that were not so there are a great many cheap and heavy articles that would not move at all. The carriers think that it is to their interest to move those at something above the cost of movement, and that it has tended to build up industries, has created industries; that it has pleased the public, and it is entirely defensible so far as I can see. It helps to develop the country and develop industries, and inures to the benefit of the public and to the railroads, although they do it at less than they might reasonably charge if they were undertaking to make this traffic bear its proportion of all expenses.

Mr. BURKE. May I ask you one question there?

Mr. CLEMENTS. Certainly.

Mr. BURKE. If I understand you correctly, in determining a rate you do not consider to any great extent the cost of the service?

Mr. CLEMENTS. Well, it can not be considered for the reason that it is not ascertainable; but, of course, that is looked to as far as it can be considered.

Mr. BURKE. If I understand you correctly, the Commission, in determining a reasonable rate, does it in exactly the same way and on the same basis that the railroads say they do it?

Mr. CLEMENTS. That is my understanding. We consider all the things which they consider. I do not think there is any difference between us about that. They sometimes insist upon giving more effect to competition than we do at some points, and also use competition for a justification for some other things they do. We differ about that. But so far as the basis of considering these things is concerned, it is the same, whether it is by the Commission or by the railroads.

Some other statements have been made here by some very reputable and worthy gentlemen in respect to the settlement of cases, to the effect that upon a certain small per cent of the complaints, formal and informal, that have come to the Commission the Commission has made orders, and of that per cent a certain proportion of the orders made by the Commission have been obeyed by the carriers, while, as to the remainder, some few suits have been brought to enforce them. I do not know where they obtained their figures. Certainly we have made no official statement of that kind. They may be correct, however, for the time they cover. These informal complaints consist of letters complaining of a rate, or an overcharge, or this or that; sometimes it is an alleged discrimination, or a burdensome rule, or a rate, or an overcharge. The Commission handles them in this way:

It is not a complaint that you can serve and the carrier can answer formally as the basis for a trial; but in order to avoid unnecessary suits, delay, and expense we make a memorandum upon it in the office from the rate sheets on file, so as to show what they indicate about the matter, and we send that to the railroads complained against (just as a letter), asking them to deal with it and let us know about it, and if there is anything wrong to correct it. They answer, and a great many of those informal complaints are disposed of in that way. If they have charged, by mistake, \$5 more than the published rate would warrant and you can show it to them, they invariably pay it, and pay it promptly, and that is the end of it. There are complaints of that sort all the time, varying from 25 cents to \$200, on these things, and much more than that in some cases. These are called the informal complaints.

The complaint is often about a rate or about a discrimination in rates. These are submitted in the same way for the correction of any injustice and with a request for information. If it is an overcharge and it is settled, that is the end of it. If it is a rate that is involved and the carrier does not see proper to change it, its reasons why it declines to do so are stated, and then the matter is submitted to the complainant. If he wants to file a complaint he does it. Otherwise it is dropped. Very frequently it is dropped.

Now, I suspect in these figures that have been used here all those cases where the matter has been dropped are classified as adjusted or settled. There has been no settlement. The shipper has abandoned the case because he found he had to make a formal complaint, at the end of which he could do no more than get an order that the carrier cease from charging that rate. There is no adjustment there. In those cases where overcharges have been claimed and obtained, they have been settled; they are adjusted, as I say, informally and satisfactorily. That is an adjustment, to be sure, but it is simply paying back what the carrier admits he took over and above his own published rate. It is not the adjustment of a rate; it is the payment of

that which the carrier took in excess by mistake over the freight he was entitled to take.

As I say, these figures are misleading, and because of these various elements they do not mean just what it has been sought to make them mean.

The Senate has sent to the Commission a request for information in regard to these matters and we are undertaking to compile it. There will be a statement of all these matters which will show their exact status and the disposition of them as soon as it can be prepared.

The CHAIRMAN. If you please, I think the committee would like to have you explain the method pursued by the Commission with reference to a complaint; what is the process?

Mr. CLEMENTS. You mean a formal complaint?

The CHAIRMAN. Yes; what is done?

Mr. CLEMENTS. Well, the complainant makes out and alleges as he would in a petition or a bill in court, setting forth what he complains of and against what carrier. They frequently do not say that the carrier is engaged in interstate commerce; they may say the rate is from "Atlanta to New York," or something like that, and omit to state the roads that make up the actual physical line. It then becomes necessary for the Commission, in order to avoid delay, amendments, and things of that kind, to send the petition back, indicating what should be inserted.

For instance, to give the Commission jurisdiction it must be said that they are engaged in interstate commerce, and the roads must be stated, the technical names of the roads, the names under which they are chartered, and so on. Well, when that is done, it is signed by the complainant and sent to the Commission. It is then filed, copied, and a copy is mailed by registered letter to each carrier complained of, together with a notice from the Commission that the carrier shall file answer within twenty days or some other period of time. Twenty days is usually the time. When it is on the Pacific coast we give a longer time. When it is near by, if it is urgent, if it is a matter of perishable fruit in the spring, or something of that kind, and it seems necessary that whatever is done must be done in a short time, we fix a less time. The law only says reasonable notice. So we are governed by circumstances, distance, etc. The carrier answers within the time or asks for further time, and then answers. Then as soon as the Commission can find a time when it can set the case for a hearing it does it, and notifies the parties that the case will be heard at Chicago or Atlanta, or wherever the place is, at such a time. The Commission goes there and sits down with a stenographer and takes the testimony. That is written out by the stenographers, typewritten, furnished free to each side, and then after argument, oral or written, or both, it is submitted to the Commission.

Mr. BURKE. Does the whole Commission attend that meeting?

Mr. CLEMENTS. As near as possible; it is not always possible to do so. We have a good many cases sometimes, so that we have to divide up. In an important case we try to have as many as three of the Commissioners present, or all of them if possible. But in a number of cases one Commissioner goes and takes the testimony, and after it is written out it is submitted to the whole Commission. There is no way to deal with all the cases except in some such way. Sometimes

the testimony is taken by deposition, for which the law provides. The parties, on notice to each other, may do that.

The CHAIRMAN. Is it necessary for the complainant to appear by counsel?

Mr. CLEMENTS. No, sir; that is not required.

The CHAIRMAN. Are the expenses of witnesses paid?

Mr. CLEMENTS. We print on the subpoena that each party will pay his own witnesses, so as to avoid as far as possible the payment out of the public money of any witness fees. And in all civil cases that is adhered to. Sometimes, when we have an investigation that relates to these secret rebates and things of that kind, and a witness is not willing to come, we issue a subpoena and pay him.

The CHAIRMAN. Would you pay the expenses of an indigent complainant?

Mr. CLEMENTS. The witness fees; you mean the witness fees?

The CHAIRMAN. A man who is unable to pay.

Mr. CLEMENTS. I do not know if we ever have done that. I do not know if a case of that sort was presented whether we would feel authorized to do that or not. I am sure it has never been done. We try to avoid that by setting these cases as near to the complainant as possible. They may be heard, all of them may be heard, in Washington under the law; but we long since found that that amounts to a denial of any hearing at all, because where there is a large number of witnesses to come these distances and pay their hotel bills and so forth they could not afford to do it. Consequently, we set these cases as near as possible to the residence of the complainant.

We have found no difficulty in getting witnesses in that way. The railroads do not complain of that, because it is about as easy for them to go one place as to another. They are men who are generally traveling anyhow, and they do not find any hardship in that. Sometimes they prefer to go to a place where there is a good hotel rather than to a place where there is not a good hotel, but they do not make any protest. They go wherever the case is set.

Now, I have about concluded what I wanted to say. In respect to the importance of this question I have some figures here, made a few days ago, which do not show that there are unreasonable rates, but they do, to my mind, show that this is a very important question and one which ought to be controlled in some tangible way by law. Upon a total mileage of 187,000 miles of railway for the year ending June 30, 1899, the carriers reporting to the Commission earned in gross \$1,313,000,000, in round figures. Upon a mileage of about 209,000 miles in the year ending June 30, 1904, they earned, gross, \$1,966,000,000, showing an increase for the last year named over the first one of \$653,000,000. This increase exceeds the entire receipts of the Government of the United States for the last fiscal year from all sources. The increase of net earnings for the last year mentioned as compared with the first year mentioned, five years previous, is \$177,000,000.

The gross earnings per mile of line for the first year named were \$7,005 per mile; for the last year named it was \$9,410. The net earnings of line per mile for the first year were \$2,433, and for the last year \$3,055.

Mr. TOWNSEND. In determining the net earnings of the road, is the Commission in a position to know whether a proper proportion has been assigned to operating expenses?

Mr. CLEMENTS. Well, the Commission has been endeavoring with its utmost ability, under the help of Professor Adams, our chief statistician, to get on a uniform basis, so that all reports would be alike and would make a fair showing as between operating expenses and permanent improvements, and so on. I can not say that it is perfect yet, but these figures I have read are made and reported by the carriers.

Mr. STEVENS. This is a question that I have been requested to ask you. In considering the wrongs under the long-and-short-haul clause—section 4, as I remember—between localities, has there been any attempt by the Commission to remedy any such wrongs as might be caused by long-and-short-haul conditions under the third section of the act—discriminations?

Mr. CLEMENTS. Yes.

Mr. STEVENS. In what way and what have you done?

Mr. CLEMENTS. Well, in the Chattanooga case, which was a long-and-short-haul case originally, after it got into court, before it reached a decision in the circuit court the Supreme Court had made its decision construing the fourth section. The Chattanooga case had been decided under our construction of the fourth section as originally announced, but the Supreme Court overturned that before the Chattanooga case reached trial in the circuit court. Judge Severance held in that case that the third section would apply if the fourth did not. There was new testimony in the court bringing the case down to the time it was tried over again in that court. The judge said further that while there might be a greater charge for a short haul than for a long haul, it ought not to be out of proportion to the difference in circumstances and conditions; that it ought to be measured by them and not more. That case came to the Supreme Court and it was reversed.

The CHAIRMAN. In your judgment, Judge, would it be practical or just to strike out from the fourth section the language "under similar conditions and circumstances?"

Mr. CLEMENTS. Well, of course it is a difficult matter to answer in a satisfactory way what would be the effect of that in all cases. But there is much hardship and friction growing out of the present condition, and I believe that the evils and hardships, if those words were stricken out, would be much fewer than now. The public on the whole would be greatly benefited.

Mr. RYAN. Is it not a fact that in nearly all of the important cases before your Commission the shippers have been represented by counsel, all of the important ones?

Mr. CLEMENTS. Yes; that is true.

Mr. STEVENS. On what point was that case decided on the third section—that Chattanooga case?

Mr. CLEMENTS. That case involved the rates to Chattanooga, as compared with the rates to Nashville by the eastern gateway—that is, by the Southern Railway from Baltimore and New York, and so on around to Nashville through Chattanooga, so that Chattanooga was the near point. Now, the Louisville and Nashville Railroad

from across the Ohio also reaches Nashville. It had put in certain rates there for reasons of its own—rates to Nashville—which had to be met by the roads carrying by the eastern lines, or nearly met, in order to get part of the business by that route from the east, but in doing that they did not want to reduce their Chattanooga rates to the level of the Nashville rates. The Supreme Court appears to have held in that case, if I understand it, and I am simply speaking from memory, that that rate having been fixed at Nashville by the Louisville and Nashville road, the roads reaching Nashville from other territory and by another route were at liberty to meet that competition as they found it and without respect to what they charged to Chattanooga, provided, of course, the Chattanooga rate itself was not in and of itself unreasonable, which would be an independent question.

Mr. ADAMSON. As to whether circumstances and conditions are similar or not is a question of fact, is it not?

Mr. CLEMENTS. Undoubtedly.

Mr. ADAMSON. Do you not think the law ought to leave questions of fact with the Commission, and have reviewing courts to confine themselves to the law entirely?

Mr. CLEMENTS. Well, as I said a while ago, I did not come here to discuss these bills particularly, and I did not want to indulge in any discussion of that on my own motion, because my chief purpose here was simply, out of self-respect, to show these insinuations or accusations against the Commission to be unjust and unfair and at variance with the record and history of the Commission.

Mr. ADAMSON. Has not new evidence been heard by the circuit court in almost every case in which you have been reversed?

Mr. CLEMENTS. I guess every one of them; I do not think there has been an exception. They always try the case over again after it leaves the Commission.

Mr. ADAMSON. Suppose in case parties have discovered new evidence, and are entitled to a hearing on it, the law should require a further hearing before the Commission, and then let the appeal go on to the court upon the law, do you not think the working would be more satisfactory and fairer to the Commission and to the parties?

Mr. CLEMENTS. I have never been able to see how the Congress can confer upon the court the power to make a rate for the future, since the Supreme Court has decided that that act is a legislative act, and I do not understand that under the Constitution a judicial tribunal can legislate. As the Supreme Court has decided that this is a legislative act directly, I suppose it can only be exercised by Congress or some body other than a court authorized by Congress.

Mr. ADAMSON. When courts of equity want the help of a master and send a case back time after time to the master to take additional testimony, they allow the master to pass on it every time, do they not?

Mr. CLEMENTS. I understand that to be the practice.

Mr. LAMAR. I would like to ask you one question, if I may.

Mr. CLEMENTS. Certainly.

Mr. LAMAR. Is there any recommendation of the President in his message substantially or exactly the same as the request made by your Commission for years as to giving power to enforce a rate when it is declared reasonable? Take the message of the President. He recommends, as I understand it, that the Commission be given the power

to decide on a reasonable rate, and that when a rate is so declared to be reasonable that it shall go into effect at once.

Mr. CLEMENTS. Yes, sir.

Mr. LAMAR. What does that "at once" mean?

Mr. CLEMENTS. I suppose that means, as I understand it, as soon as the carrier could be notified and would have opportunity to print his tariff in such a way as to conform to it.

Mr. LAMAR. Has this bill given that power? [Reading.]

And it is hereby authorized to perform that duty, to declare at the same time what would be a fair, just, and reasonable rate or regulation or practice in lieu of the rate, regulation, or practice declared unreasonable, and the new rate, regulation, or practice so declared shall become operative twenty days after notice.

Does that give the power to fix that rate at once—to go into effect at once?

Mr. CLEMENTS. It seems to me it would from your reading of it.

The CHAIRMAN. If the Commission was given the power referred to in that last query should its exercise of that power be subject to any judicial review, in your judgment?

Mr. CLEMENTS. I do not see any reason why it should not be to any judicial review that is possible to be had under constitutional and legal methods. The Commission has never asked for the power to make a final rate independent of anything of that sort; but, at the same time, I have in late years, and particularly since the decision of the Supreme Court in the minimum-rate case, as it is called, had very great doubt as to whether the courts will ever apply their judicial authority to the question of making a rate—that is, saying whether it shall be 90 cents or 95 cents—or that they will do any more than decide whether or not it is or is not lawful.

The CHAIRMAN. Reasonable?

Mr. CLEMENTS. Yes, sir.

The CHAIRMAN. You think they have that power?

Mr. CLEMENTS. Yes; I should think that would be included—the judicial question.

The CHAIRMAN. And it is your opinion that the Commission should take that away from the courts?

Mr. CLEMENTS. I do not believe it can, if the Constitution gives protection to the property of everybody, theoretically at least, and the doors of the courts are open all the time to restrain an order by this Commission, or any State commission, which intrenches upon the constitutional rights of property involved in these cases.

Mr. ADAMSON. If the section read by Mr. Lamar were enacted into law, leaving both the courts open as now for the railroads to interfere with your proceedings, and also the statutory proceedings for you to go into court on your judgment, you think there is no necessity for further legislation as to procedure—you think we could get along?

Mr. CLEMENTS. That would probably cure that particular thing. Of course there are a good many other things that could improve the law, but I do not care to go into them.

Mr. ADAMSON. Are not there sufficient avenues open——

Mr. CLEMENTS. It seems to me so.

Mr. ADAMSON (continuing). If we can get this section Mr. Lamar read to you?

Mr. CLEMENTS. It seems to me so, if there was some way to have that obeyed. To say that such a rate is a lawful rate is one thing, and to have it conformed to is another thing.

Mr. ADAMSON. I want to ask you about another bill. I believe you have read the bill I introduced early in the Fifty-eighth Congress.

Mr. CLEMENTS. Yes; some time ago.

Mr. ADAMSON. I would like to ask you whether it is your recollection that that embodied all the recommendations, substantially, that the Commission made for amendment to the law?

Mr. CLEMENTS. It embodied as many as were concurred in by the Commissioners, I think. Of course there are five of us, and we do not all agree.

Mr. LAMAR. One other question, Judge, and I am through. Upon the question of capitalization I asked Mr. Bird a question, and I would like to ask you substantially the same thing. Leaving out all question of contest among carriers for freight, and leaving out all question of a particular rate as being unreasonable, and taking the whole tariff sheets of the railroads of the United States, must they not bear a direct relation to the capital invested in those properties?

Mr. CLEMENTS. I think so. The Supreme Court has indicated that.

Mr. LAMAR. The Supreme Court has said that in the Nebraska case. If that be true, and the Supreme Court has gone to the extent of saying that they can not earn compensation upon fictitious capital—

Mr. CLEMENTS. Yes.

Mr. LAMAR. Now, has your Commission ever inquired into the question of how much fictitious capital exists in all the railroads of the United States?

Mr. CLEMENTS. It has never made any exhaustive examination of that matter that would be at all satisfactory.

Mr. LAMAR. As I understand it, the public generally has a belief, whether it be true or not—and it is a pity that that matter has not been investigated—that a large proportion of the capital of American railways is fictitious. If that be true it disposes of the argument of the railway men that railroad rates are reasonable, because if they are confiscatory they are unreasonable and extortionate. So that is an important question. The Supreme Court has said that as the basis of overthrowing a schedule of rates.

Mr. CLEMENTS. It is a very important question and a very large one.

Mr. LAMAR. It is such a vital question I am surprised that no statistics exist in the United States to challenge the fictitious capital—wind and water, as it is called popularly—in railways, for the simple fact that if that fact were proven it would be conclusive proof to the American mind that the present rates are unreasonable. Taking their own assertion that the present railroad rates are reasonable, it overthrows their statement at once, because it would be patent that they were earning dividends on capital not invested, and the Supreme Court says they can not do that.

Mr. MANN. What is the average rate of dividends now on all the capital stock of the railways of the United States, par value?

Mr. CLEMENTS. I have not those figures with me, Mr. Mann.

Mr. MANN. I suppose it would depend on what the present rates are whether it would show what Mr. Lamar suggests?



Mr. LAMAR. Does not the Industrial Commission in its general conclusions—I ask for information, I am not quite sure about it—say that everything is conjecture—and I believe there is a great deal of conjecture about all these questions—but being permitted to have their guess, have they not guessed that a large percentage of capital in the railways of America is fictitious?

Mr. CLEMENTS. I believe so.

Mr. MANN. The market value of the capital stock will demonstrate that fact, that it is either fictitious or worthless.

Mr. CLEMENTS. Yes; some of it is not worth much.

Mr. BURKE. I understand you to say that discriminations by reason of a secret rate or cut rate or rebate have practically ceased?

Mr. CLEMENTS. As compared with what was going on three or four or five years ago, yes. I do not mean to say in this vast country, with all its great variety of commercial interests and industries, that there is not some of that going on, and probably there always will be, but it has been very greatly diminished.

Mr. BURKE. I believe you stated that certain proceedings were instituted in the way of injunction proceedings under the Elkins law.

Mr. CLEMENTS. Yes.

Mr. BURKE. Is your legislation adequate and sufficient on that point?

Mr. CLEMENTS. Well, we have several cases pending now under the Elkins law, and it is a little too early to say it will be sufficient in all respects, because it has not been tested, as we have had to test these former laws, by judicial procedure.

Mr. BURKE. Have you any reason to think at this time that it is not adequate?

Mr. CLEMENTS. I have no suggestions to make in the way of further legislation to cover what are known as secret rebates, cut rates, and so on, which are covered mainly by the Elkins bill; but among other things one important thing is to practically prohibit and effectually stop certain abuses in respect to these terminal railways and car lines. For instance, an industrial plant that was a manufacturer and was running for no other purpose some few years ago has had switches put in and has incorporated as a railroad, and then it asked of the real railroad a division of the rates. Competition between carriers leads to that.

The CHAIRMAN. Is it your opinion that the present legislation gives power to the Commission and the courts to remedy those evils?

Mr. CLEMENTS. There is some difference of opinion among us about that.

The CHAIRMAN. I am asking your opinion.

Mr. CLEMENTS. It is stoutly denied by the car-line owners, and by the railroads, too, that use those car lines, that the Commission can pass upon the reasonableness of a refrigerator charge, an icing charge made in connection with the transportation of fruits and vegetables coming from California and other points to the eastern market. A great many of those railroads now have exclusive contracts with these car companies that the refrigerator cars of the companies shall be handled exclusively by railroad companies. The railroads do not publish the schedules for the icing service—

The CHAIRMAN. I was asking you particularly with regard to the two instances that you gave where a fictitious railroad is created for the purpose of a joint rate and where an extravagant mileage is paid.

Mr. CLEMENTS. I do not see why that can not be found upon the facts to be a rebate, where it is excessive.

The CHAIRMAN. Then, in your judgment, the present legislation is sufficient to remedy those evils?

Mr. CLEMENTS. That is what I think, although that is an untried question. We have some matters of that kind now pending.

The CHAIRMAN. I am asking your opinion.

Mr. TOWNSEND. The question was asked you a little while ago in regard to the courts reviewing the unreasonableness of a rate. I notice in all the bills it is provided that the court may pass upon the reasonableness and lawfulness of the rate. What is the distinction between those two terms; or, to put it in other words, what is there in "reasonableness" that is not covered by "lawfulness" that would be reviewable by the courts?

Mr. CLEMENTS. I do not know yet what the law is about it. I do not suppose there is anybody here who can say for a certainty. Suppose the law was that the Commission could, upon inquiry, fix a reasonable rate, which would be the lawful rate without appeal, with no review, and that would be the end of the law according to its terms.

Now, the railroad could nevertheless go into the courts, without any further provision of law, under the Constitution of the United States, and attack that rate as confiscatory just as if Congress had said that should be the rate, or a State commission or State legislature should say it, as they have done in various cases. Suppose it is claimed by the carrier that it is unreasonable because it does not allow a fair compensation, and, therefore, to that extent is confiscatory, because it intrenches upon the right of the carrier to make a reasonable return upon the actual capital invested. Now, will the court hold that that is an unlawful rate because it is unreasonably low and yet that there is some profit, but not enough? I confess I do not know—

Mr. TOWNSEND. Does not unlawfulness cover all the ground that you hope to cover there, without the word "unreasonable?"

Mr. CLEMENTS. I think it does; that is my judgment about it. I hardly think a court would hold a rate to be lawful that was unreasonable. It is because it is unreasonable that the law allows the court and the Commission to condemn a rate made by the carriers, and if it is unreasonable to the carrier I suppose the courts would apply the same rule—

The CHAIRMAN. Might not a rate be unreasonably low, fixed by the company itself, and yet be lawful so far as those parties were concerned?

Mr. CLEMENTS. I presume so; I have never thought otherwise.

The CHAIRMAN. And yet be unreasonable and unlawful so far as other parties were concerned—its discriminating between localities?

Mr. CLEMENTS. That is what this law proceeds upon now, that there may be discriminations of that sort; and by having one rate unreasonably low and another one unreasonably high, or even reason-

ably high, the difference is so great that it allows one shipper to overreach his competitor. That is what I understand to be undue and unreasonable discrimination.

The CHAIRMAN. If the high rate was reasonable in the case of localities, then the remedy would be to raise the lower rate, would it?

Mr. CLEMENTS. If the higher rate was reasonable?

The CHAIRMAN. If the higher rate was reasonable and the other rate unreasonably low, creating a discrimination between localities, would that furnish a case for the intervention of the Commission and the raising of the lower rate?

Mr. CLEMENTS. Well, we do not understand that under the law we can do that. We have said repeatedly in these cases where we thought that was the case that we condemned the discrimination, found that unreasonable and wrong, and ordered them to cease and desist from that, and admitted that they could cure that by raising the lower rate.

The CHAIRMAN. I am speaking now of localities that were not served by the same carrier.

Mr. CLEMENTS. Oh!

The CHAIRMAN. Where the discrimination is between localities.

Mr. CLEMENTS. As between places served by the same carrier?

The CHAIRMAN. No; by other carriers; and the higher rate is conceded to be a reasonable rate and the lower rate unreasonably low. Now, in order to remedy that discrimination would you raise the lower rate?

Mr. CLEMENTS. That is a new question. Of course no such question as that can be raised in the law we now have, as I understand it. The present law deals with the carriers. You can not make one carrier change its rates because of what some other independent carrier is doing, whether it is a high or low rate.

The CHAIRMAN. Then questions of discrimination of that kind between localities are not within the jurisdiction of the Commission?

Mr. CLEMENTS. Not unless the discrimination is by the same carrier.

The CHAIRMAN. In your judgment, do you think discriminations of the kind I have spoken of ought to be within the jurisdiction of the Commission?

Mr. CLEMENTS. That is a pretty broad question, and I would hesitate to say that they ought to be.

The CHAIRMAN. You think that they ought not to be?

Mr. CLEMENTS. I am not prepared to say that they ought to be.

The CHAIRMAN. Is it not true that the Commission has frequently assumed jurisdiction of discriminations of that kind?

Mr. CLEMENTS. By different carriers?

The CHAIRMAN. Yes, sir.

Mr. CLEMENTS. No, sir; I do not understand so. We have investigated the condition of rates by all carriers between certain points frequently, but not with the view of making the roads parties and issuing an order against a particular carrier or several carriers on account of rates that other and independent carriers have made; we have not done that.

The CHAIRMAN. The Eau Claire case, you do not think, involved that question?

Mr. CLEMENTS. I think in that case the Commission finally found that its order could not be enforced because one road served one of the favored points and didn't serve the complaining town. We understand this act to run and apply against carriers if they combine or if they make a through line, and so forth, and we have investigated tariff conditions and practices in respect to the railroads in a large territory, but not on a complaint in which we expected to make an order correcting any differences of the sort you mention.

It is said by the carriers in opposition to public rate regulation that "an unreasonable rate per se is a thing of the past." If the shipper has any right involved in the amount of the rate, there should be some place where he can be heard as well as the other party to the controversy who is making the rate; and such hearing should be with the usual effect of ordinary hearings in other matters, to the ascertainment of what is right and lawful and the enforcement of the same. Any other course must assume that the carriers can do no wrong in respect to these matters and exempt the complaints and issues in respect thereto from the ordinary and time-honored methods of procedure, which are based upon the principles of fair play and equal justice and have been recognized at least as long as the common law has existed.

Gentlemen, I am very much obliged to you. I have taken very much more time than I intended.

The CHAIRMAN. I would like to say to the committee that Mr. Crocker and Mr. Rulofson, from San Francisco, who were expected here on Monday, and who were detained in Chicago, are here now, and if it is the pleasure of the committee we will hear them briefly. I will say to those gentlemen that the committee had closed its hearings.

Mr. Crocker submitted the following papers:

SAN FRANCISCO, January 19, 1905.

To all whom it may concern:

This is to certify that Mr. A. C. Rulofson was duly appointed at a meeting of the board of directors of the Manufacturers and Producers' Association, held January 19, 1905, as a delegate to proceed to Washington, D. C., for the purpose of urging upon Congress the disadvantages to the business interests of the Pacific coast of any legislation which shall give the Interstate Commerce Commission the arbitrary right to make rates.

[SEAL.] MANUFACTURERS AND PRODUCERS' ASSOCIATION OF CALIFORNIA.  
E. GOODWIN, *Secretary*.

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*Preamble and resolutions adopted by the board of directors of the Manufacturers and Producers' Association of California, January 19, 1905.*

Whereas the present welfare of the manufacturers, producers, wholesalers, and jobbers of the Pacific coast and the future growth and development of their various and varied business interests depend largely upon a system of rate making by the transcontinental railroads, by which the terminal rate to which the jobbing and manufacturing cities of the coast are justly entitled by reason of water competition is recognized; and

Whereas determined effort has been made in the past by the manufacturers, producers, wholesalers, and jobbers of other sections to do away with said

terminal rates to Pacific coast cities, and substitute therefor a system of rates based on distance or mileage, ignoring water competition; and

Whereas the assistance rendered the manufacturers, wholesalers, and jobbers of the Pacific coast by the transcontinental railroads in combatting said effort to establish rates based on distance or mileage satisfies us that the interests of the coast will be best served by leaving the authority to make rates where it now is, in the hands of the carriers, who are familiar with the exceptional conditions on the Pacific coast and the Northwest, subject to review by the Interstate Commerce Commission upon complaint of the shipper who feels that a given rate is wrong: Now therefore be it

*Resolved*, That the Manufacturers and Producers' Association of California, while expressing the highest respect for and confidence in, personally and collectively, the members of the Interstate Commerce Commission, respectfully protest against any legislation whereby said Commission would be given the arbitrary right to make rates as inexpedient and not to the advantage of business interests of this community, and that we recommend in lieu thereof that the Commission be increased to seven members and that in view of the vast commercial interests involved and the differences governing transportation on the Pacific coast and in the Northwest that the two new members thus added to the Commission should be appointed one from the Pacific coast and one from the Northwest, so that all geographical sections of the country would be represented; and be it further

*Resolved*, That the law under which the Commission is at present operating is, in our judgment, a proper one if proper measures are taken to expedite the hearing of cases upon appeal, which would contemplate the establishment of a court of transportation, whose decision would be final except in cases where the constitutionality of the decree was questioned.

MANUFACTURERS AND PRODUCERS' ASSOCIATION OF CALIFORNIA.

A. SBARBORO, *President*.

E. GOODWIN, *Secretary*.

#### ADDITIONAL STATEMENT OF MR. E. P. BACON.

Mr. BACON. Mr. Chairman and gentlemen of the committee, I wish to thank you for having accorded me a little further time to conclude the remarks which I commenced this morning and to say that it is highly appreciated.

In line with what I was stating this morning I have an additional paper to submit in relation to a question that I was asked when I was on the stand some weeks ago as to whether a carrier, in case of the Commission ordering a change in rates, would make a slight change instead of complying fully with the order of the Commission. I have a statement of a few cases of that kind which I will not read, but will file; but I will hastily refer to one or two instances. One is a case against the C. J. M. and R. Railway Company and others, decided June 15, 1893, involving rates from Tecumseh, Mich., to Kansas City, Mo., on celery and other vegetables which had been placed, respectively, in class 3 and class C. Class 3 is one of the numbered classes, of which there are six, and class C is one of the lettered classes, of which there are five, showing a difference of six classes in the classification of the respective articles. The order of the Commission was that both should be charged at the same rate, or, in other words, classified in the same class. The action of the carrier was to keep celery in class 3 and put other vegetables in class 5.

Another case is Newland and others against the Northern Pacific Railroad Company, decided March 21, 1894, involving the rate on

wheat from Ritzville, Wash., to Portland, Oreg., which was 32½ cents. The Commission ordered it reduced to 20 cents. The railroad company reduced it to 21½ cents, making a very large reduction to be sure, but not such reduction as was required by the Commission.

In another case, the Cordele Machine Shop against the Louisville and Nashville Railroad Company and others, decided October 19, 1895, in the transportation of pig iron from Birmingham, Ala., to Cordele, Ga., the rate being \$3.84 per ton, the Commission ordered a maximum rate of \$1.80 per ton. The carrier reduced it to \$3.69 per ton—that is, reduced it 15 cents when it was required by the Commission to reduce it \$2.04. In the case of the Georgia Peach Growers' Association against the Atlantic Coast Line Railroad et al., in a case decided June 4, 1904, the rate on peaches was \$80 per car, and the rate ordered by the Commission was \$50 a car. The rate made by the railroad after the order was \$65 per car. I will file a copy of these orders and changes in the rates after the order, showing how carriers have only partially complied with orders of the Commission.

The CHAIRMAN. Do you understand that there are many other cases?

Mr. BACON. The list which I have comprises six cases, which are presented as examples of the action of carriers in complying only to a partial extent with orders of the Commission.

*Table showing a few examples of how carriers have only partly complied with orders of the Commission.*

| Title of case.                                     | Date of decision. | Places involved.  | Commodities.                      | Rate at date of order. | Maximum rate ordered.         | Change made after order. |
|--|-------------------|---|-----------------------------------|------------------------|-------------------------------|--------------------------|
| Re Food Products.                                  | June 7, 1890      | Missouri River points to East St. Louis.                            | Wheat, per 100 pounds.            | \$0.17½                | \$0.14                        | \$0.15                   |
|  |                   |   | Corn, per 100 pounds.             | .15                    | .12                           | .12                      |
|  |                   |   | Flour, per 100 pounds.            | .17½                   | .14                           | .15                      |
|  |                   |   | Celery, per 100 pounds.           | Class 3                | Both to be charged same rate. | Class 3.                 |
| Tecumseh Celery Co. v. C. J. and M. R. Co. et al.  | June 15, 1893     | Tecumseh, Mich., to Kansas City, Mo.                                | Other vegetables, per 100 pounds. | Class C                |                               | Class 5.                 |
| Newland et al v. N. P. R. Co. et al.               | Mar. 21, 1894     | Ritzville, Wash., to Portland, Oreg.                                | Wheat, per 100 pounds.            | .32½                   | .20                           | .21½                     |
| Cordele Machine Shop v. L. and N. R. Co. et al.    | Oct. 19, 1895     | Birmingham, Ala., to Cordele, Ga.                                   | Pig iron, per ton.                | 3.84                   | 1.80                          | 3.69                     |
| Ga. Peach Growers' Assn. v. A. C. L. R. Co. et al. | June 4, 1904      | Boston to New York as part of through shipment from Georgia points. | Peaches, per car.                 | 80.00                  | 50.00                         | 65.00                    |
| Denison L. and P. Co. v. M. K. and T. R. Co.       | June 25, 1904     | South McAlester, Ind. T., to Denison, Tex.                          | Coal, per ton.                    | 1.90                   | 1.25                          | 1.50                     |

The foregoing cases are taken from the reports of the Interstate Commerce Commission.

I wish to allude to the statements which have been made in regard to advances and reductions in rates resulting from changes in classifications, which have been represented to the committee as having been nearly as great in the number of reductions as in the number of advances. A gentleman on the stand this morning, if I under-

stood him correctly, stated that the reductions had exceeded the advances.

The CHAIRMAN. He said in his territory.

Mr. BACON. Yes; in his territory. The southern territory. In this document, Senate Document No. 257, second session of the Fifty-eighth Congress, being a report from the Interstate Commerce Commission to the Senate in response to a Senate inquiry in regard to changes in rates and classifications in March last, it is stated that the principal advances in classification in what is called official-classification territory, which covers the territory east of the Mississippi and north of the Ohio and Potomac rivers, with the exception of the State of Wisconsin and the northwest corner of the State of Illinois—a line drawn from Chicago to St. Louis limits it on the west—the number of advances in that territory on January 1, 1900, was 572. That was the number of advances in classification from a lower to a higher class. The number of reductions was 6. That was the number reduced from a higher to a lower class. In March, 1900, however, most of the articles (289 out of 572) which had been changed from the fourth to the third class were modified by the carriers to a reduction of 20 per cent below third-class rates, which brought them about midway between those two classes as to rates; and most articles that were advanced from the third to the second class, of which there were 155, were changed to 15 per cent below second class, bringing them to about halfway between second and third. That was a modification made in the advances which I have mentioned, which was conceded on the urgent demand of a large number of commercial organizations.

The number of advances in classification in southern territory between February 1, 1900, and November 10, 1900, was 531. They made several revisions of their classification during that period, and the total number of articles advanced in classification during that time was 531. The number of reductions during the same time was 105. The number of advances in classification in western territory, which comprises the entire territory between the Mississippi River and the Pacific coast, made January 5, 1900, was 240, and the number of reductions was 17. This is compiled from the statement made by the Interstate Commerce Commission to the Senate in reply to its resolution of inquiry. I will file this Senate Document No. 257:

INTERSTATE COMMERCE COMMISSION,  
Washington, April 7, 1904.

SIR: The Interstate Commerce Commission herewith respectfully submits the following report in compliance with the resolution of the Senate of the United States, adopted March 11, 1904, which reads:

*"Resolved, That the Interstate Commerce Commission is hereby directed to furnish the Senate, as speedily as may be practicable, a report showing the principal changes in railway tariff rates, whether resulting from the adoption of new rates or the amendment of freight classifications, and an estimate of the effect of such changes upon the gross and net revenues of railway corporations in the United States during each of the fiscal years ending June thirtieth, nineteen hundred, nineteen hundred and one, nineteen hundred and two, and nineteen hundred and three, as compared with the gross and net revenue that would have been derived by them under the rates and freight classifications in force during the fiscal year ending June thirtieth, eighteen hundred and ninety-nine; and also report the changes in cost of operation and maintenance of said railways for said years."*

A statement prepared by the auditor of the Commission shows the principal changes in rates caused by changes in freight classification and the advances in

rates on a number of specified commodities. Most of these changes took place during the year 1900, but some commodity rate changes occurred between that year and the end of 1903. For the reasons indicated in the statement no more specific or comprehensive account of rate charges can be given.

The resolution directs the Commission to furnish an estimate of the effect of such changes in rates upon the gross and net revenues of railway corporations in the United States during each of the fiscal years ending June 30, 1900, 1901, 1902, and 1903, basing the comparisons upon the gross and net revenues they would have derived in those years under rates in force during the fiscal year ending June 30, 1899. As far as practicable the statement of the auditor is in conformity with such requirement, and following this statement is a table showing, for each of the years mentioned, what the gross revenue of the railways would have been if the average rate per ton received by all the railways in the fiscal year 1899 had been applied to the tonnage carried over such railways in the succeeding fiscal years to and including 1903. As to a few staple commodities the increase in revenue due to advanced rates in effect during specified periods is estimated in the statement mentioned substantially in accordance with the method of calculation directed in the resolution.

No similar calculation can be made respecting net revenue for the reason that the net revenue of a railway depends not merely upon gross earnings, but also upon cost of operation, which may be varied by numerous conditions, including the density of traffic as well as the aggregate tonnage.

From what has been stated it must appear that no accurate or even approximate estimate of the actual effect of specific changes in rates upon the revenues of the carrier can be made. The best that can be done is to indicate the rate changes, and then, without using them as factors, show by yearly tonnage and earnings and the average rate per ton for the year 1899 results similar in character to those called for by the resolution. This method of computation is not without value as indicating enormous additions in recent years to the cost of railway transportation to the people of the United States.

The statement and table above mentioned constitute Part I of the appendix hereto.

The resolution also directs the Commission to report the changes in cost of operation and maintenance of United States railways for the years therein mentioned. Except for the fiscal year ending June 30, 1903, this information is contained in a table prepared by the statistician of the Commission, which will be found herewith as Part II of the appendix. The returns for the fiscal year 1903 have not yet been compiled, and the figures relating to the cost of operation and maintenance for that year must therefore be omitted from this report.

All of which is respectfully submitted.

MARTIN A. KNAPP, *Chairman.*

THE PRESIDENT OF THE SENATE OF THE UNITED STATES.

## APPENDIX.

### PART I.

INTERSTATE COMMERCE COMMISSION,  
OFFICE OF THE AUDITOR,  
Washington, March 24, 1904.

*Memorandum.—Senate resolution, dated March 11, 1904, relative to advance in freight rates and the resulting increase in revenue of the railway corporations of the United States.*

The freight traffic of the railways of the United States is carried under two general classes of schedules known as "class tariffs" and "commodity tariffs." The latter name specific rates on certain commodities, such as grain, lumber, coal, live stock, dressed meats, fertilizers, etc. In the absence of commodity rates the regular class tariffs apply. In these tariffs the rates are arranged in classes and are used in connection with a freight classification, which indicates the class to which any given article belongs. Where an article is changed from one class to another, the effect, therefore, is to change the rate of transportation upon that article.



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For many years there have been three general freight classifications in use throughout the United States, namely, the official classification, which governs the class rates generally in the territory north of the Ohio and Potomac rivers and east of the Mississippi River and Lake Michigan; the southern classification which governs generally in the territory south of the Ohio and Potomac rivers and east of the Mississippi River, and the western classification, which governs generally in the territory west of the Mississippi River and also applies on traffic between Chicago, Peoria, and certain other points east of the river and points west thereof.

On January 1, 1900, official classification No. 20 became effective. This classification made many advances in ratings over the previous classification (No. 19), which was in force prior to the date mentioned. The total number of ratings advanced was 818, but it was found that there were many duplications, the same article being classified more than once in different parts of the classification, and that such duplications amounted to about 30 per cent of the total number. The actual number of advances was 572, as follows:

| Ratings. | Advanced—      |              |
|----------|----------------|--------------|
|          | From<br>class— | To<br>class— |
| 289      | 4              | 3            |
| 155      | 3              | 2            |
| 71       | 6              | 5            |
| 25       | 2              | 1            |
| 15       | 5              | 4            |
| 8        | 1              | 1½           |
| 5        | 1              | D-1          |
| 2        | 1½             | D-1          |
| 1        | D-1            | 2½           |
| 1        | 4              | 2            |
| 572      |                |              |

In the same classification (No. 20) there were six reductions in rating.

On March 10, 1900, most of the articles which had been advanced on January 1 from fourth to third class were reduced to 20 per cent less than third class, and most articles which on same date had been advanced from third to second class were reduced to 15 per cent less than second class, and these ratings still remain in force.

Prior to February 1, 1900, southern classification No. 25 had been for some time in force. There were three issues of this classification during the year 1900, namely, No. 26, effective February 1; No. 27, effective June 1; and No. 28, effective November 10. By comparing the last with No. 25 it was found that 636 changes were made during the year, of which 531 were advances and 105 reductions in rating.

Western classification No. 30, which became effective January 25, 1900, superseding No. 29, which took effect July 1, 1899, made 257 changes in rating, of which 240 were advances and 17 were reductions.

These classification changes were quite fully set forth in the annual report of the Commission for the year 1900. A number of issues of each of the classifications referred to have been made since the year 1900, but the changes made in such issues were comparatively few and were not of such importance as to deserve special notice.

As before indicated, all traffic which is carried at class rates throughout the United States is carried under one or more of the three general classifications above described. All of the thousands of railroad points throughout the country are therefore more or less affected by these classification changes, but in order to form an estimate which would be of any value as to the amount of increase in the revenues of the railways as a result of such advances in classification it would be necessary to be in possession of some knowledge, not only as to the separate tonnage carried of each of the articles affected, but as to the points between which they were carried as well. This information is not available, and even if it could be obtained the undertaking would be so enormous as to render it virtually impracticable.

The annual reports filed with the Commission by the common carriers under section 20 of the act to regulate commerce show the total tonnage of all freight carried and the total freight revenue derived therefrom; but with the exception

PROPOSED AMENDMENT OF INTERSTATE-COMMERCE LAW. 373

of a few important commodities, such as coal, ores, forest products, etc., the separate tonnage of the articles transported is not shown, and in the cases of the exceptions referred to the points between which such articles are carried are not stated. The following table shows the total tonnage and freight revenue of all the railways in the United States for the years ending June 30, 1899, 1900, 1901, 1902, and 1903, with the average rate per ton for each year, except that the figures given for the year last named represent about 98 per cent of the total operated mileage:

| Year ending June 30-- | Total number<br>of tons of<br>freight car-<br>ried. | Total freight<br>revenue. | Average rate<br>per ton. |
|-----------------------|---|---------------------------|--------------------------|
| 1899.....             | 959,793,583   | \$913,737,155             | \$0.9520                 |
| 1900.....             | 1,101,680,238                                       | 1,049,256,323             | .9524                    |
| 1901.....             | 1,089,226,440                                       | 1,118,543,014             | 1.0269                   |
| 1902.....             | 1,200,315,787                                       | 1,207,228,845             | 1.0058                   |
| 1903.....             | 1,221,475,948                                       | 1,318,320,604             | 1.0793                   |

Attached hereto is a statement showing the actual tonnage and freight revenue for the years named, and also what the total freight revenue would have been for each of the fiscal years subsequent to that ending June 30, 1899, at the average rate per ton which prevailed that year, also the increase in revenue for such subsequent years resulting from the higher average rate per ton. It is believed that such a statement gives a more accurate idea of the increased revenue resulting from an advance in freight rates and classifications than can be obtained in any other way. The figures given include the tonnage and also the revenue derived from both class and commodity rates, there being no way of showing these items separately.

It should be borne in mind, in connection with this statement, that the average rate per ton and the average rate per ton per mile, being determined from the tonnage carried and the revenue derived therefrom, and not from the tariffs, would vary somewhat for different years without any change being made in the tariff rates, such variation being due to the difference in the relative quantity of the various classes of freight carried. For instance, should there be a marked increase in the percentage of tonnage of low-grade freight for any given year over the preceding year, the average rate per ton and the average rate per ton per mile would show a decrease for the latter, as compared with the previous year, based on the same tariff rates. It may be said that there is a constant tendency toward an increase in the percentage of the tonnage of low-grade freight, so that if there had been no advances in rates or classification since the year ending June 30, 1899, it is safe to say that the average rate per ton for each of the subsequent years would have been somewhat less than for that year.

The increase in the average rate per ton for the year ending June 30, 1900, over the previous year was quite small, being only four one-hundredths of a cent per ton, and by reference to the statement it will be seen that the increase in revenue for that year over the preceding year was only \$456,736. For the year ending June 30, 1901, the increase in the average rate per ton over the year ending June 30, 1899, was 7.49 cents, the difference in revenue being \$81,599,443. The average rate per ton for the year ending June 30, 1902, was \$1.0058, being 5.38 cents greater than the average rate for the first-mentioned year, but a little over 2 cents per ton less than for the preceding year. The difference in revenue for this year over what would have been produced by the average rate of the first year in question was \$64,528,216. The falling off in the average rate per ton appears to have been due to a large increase in low-grade tonnage in 1902 over the preceding year. For instance, in the items of coal, coke, and ores alone there was an increase in tonnage for this year over the preceding year of nearly 30,000,000 tons.

For the year ending June 30, 1903, it will be seen there was a large increase in both tonnage and revenue over any of the previous years mentioned, the increase in revenue, however, being relatively much greater than the increase in tonnage. The average rate per ton for this year was \$1.0793, or nearly 12½ cents per ton greater than the average rate per ton for the year ending June 30, 1899, been at the average rate of the first-mentioned year.

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In the reports of the Commission on the Statistics of Railways in the United States, compiled from the annual reports of the carriers filed under section 20 of the act to regulate commerce, the railways of the country are divided into ten territorial groups, the tonnage, revenue, etc., for each group being separately shown. As heretofore indicated, the annual reports of the carriers show the tonnage of a few important commodities separately, and while the separate revenue derived therefrom and the points between which the articles are carried are not given, where advances in rates have been made on any of these commodities it is possible to form an estimate of the increase in revenue resulting from such advances, which no doubt, while considerably at variance with the actual figures, were they obtainable, will give a fair idea as to the increase in revenue resulting from an advance in rates on such articles.

In the territory governed by the official classification, heretofore described, both hay and sugar in carloads were advanced January 1, 1900, from sixth to fifth class. Between New York and Chicago this advance amounts to 5 cents per 100 pounds, or \$1 per ton. Between New York and the territory lying between that point and Chicago the advance would be less, in some cases as low as 40 cents per ton, while in the territory west of Chicago and east of the Mississippi River the advance would be in some instances as high as \$1.50 per ton. An average advance of 80 cents per ton on these two commodities in official classification territory, it is believed, is a fair estimate.

The total tonnage of hay reported by originating roads for the years ending June 30, 1900, 1901, and 1902, was as follows:

|            | Tons.       |
|------------|-------------|
| 1900 ----- | 4, 112, 092 |
| 1901 ----- | 4, 086, 700 |
| 1902 ----- | 4, 681, 509 |

The figures giving the separate tonnage of this commodity for the year ending June 30, 1903, are not yet available.

It is calculated from the statistical reports of the Commission that of the total tonnage carried by the railroads of the United States about 65 per cent is carried in the territory governed by the official classification. Taking the total tonnage of hay for the last year mentioned (1902), namely, 4,681,509 tons, 65 per cent thereof would be 3,042,980 tons. Based on an average advance of 80 cents per ton in rate, the increase in revenue for that year would be \$2,434,384. and from January 1, 1900, to the present time, during which the advanced rates have been in force, nearly \$10,000,000. There was no advance in the classification of hay in the southern and western classifications.

The total tonnage of sugar originating on reporting roads for the same years was as follows:

|            | Tons.       |
|------------|-------------|
| 1900 ----- | 2, 050, 558 |
| 1901 ----- | 2, 301, 932 |
| 1902 ----- | 2, 254, 571 |

The classification of sugar, as before stated, was advanced in the official classification territory at the same time as hay (January 1, 1900), and to the same extent, namely, from sixth to fifth class, the increase between New York and Chicago being 5 cents per 100 pounds, or \$1 per ton. Taking 65 per cent as the proportion of the total tonnage carried in the official classification territory, we have for the year ending June 30, 1902, 1,405,471 tons. On the basis of an average advance of 80 cents per ton the increase in revenue for that year would be \$1,172,376, and from January 1, 1900, to the present time, during which the advanced rates have been in force, something over \$4,500,000.

In the western classification no advance was made in the classification of sugar, while in the southern it was advanced from sixth to fifth class. In the latter territory, however, sugar shipped from the regular shipping points, such as New Orleans, La., and Mobile, Ala., is almost invariably carried at commodity rates. It does not appear that any general advance has been made in these rates, and recently material reductions have been made.

On January 1, 1900, when the carload rating of hay and sugar was advanced, the carload rating on about 70 other articles was also advanced from the sixth to the fifth class in the official classification, but there is no way of arriving at even an estimate of the tonnage of these articles, and no estimate can, therefore, be made as to the increased revenue resulting from the advance in classification of such articles.

At the beginning of the year 1903 the rates on all iron and steel articles were advanced 10 per cent in the territory governed by the official classification. The annual reports of the carriers do not appear to include all iron and steel articles in the table which gives the separate tonnage for particular commodities. According to the reports for the year ending June 30, 1902, the total tonnage of iron and steel articles originating on reporting roads was as follows:

|                                   | Tons.        |
|-----------------------------------|--------------|
| Iron, pig and bloom.....          | 14, 714, 989 |
| Iron and steel rails.....         | 4, 849, 255  |
| Other castings and machinery..... | 9, 696, 433  |
| Bar and sheet metal.....          | 10, 624, 712 |

Machinery is not included in the list of iron and steel articles and does not take the same rates. The third item, as given above, must therefore be eliminated. The total of the other three items is 30,188,956 tons. Taking 65 per cent of this as the tonnage carried in official classification territory we have 19,622,821 tons. The advance ranged from about one-half to 1½ cents per hundred pounds. The average was probably short 1 per cent per hundred pounds, or 20 cents per ton. Assuming the tonnage of these articles for the year 1903 to be not less than for 1902, the increased revenue thereon for that year, owing to the advance in rates, would be about \$4,000,000.

The total tonnage of bituminous coal for the year ending June 30, 1902, was 154,402,501 tons. There appear to have been few important changes in the rates on this commodity in southern and western territory since January 1, 1900. In the territory north of the Ohio and Potomac rivers and east of the Mississippi of this commodity for 1902, the increase in revenue for 1903, at an average aged 10 cents per ton. Again, taking 65 per cent of the entire tonnage as the amount carried in this territory, we have 100,361,625 tons. Based on the tonnage of this commodity for 1902, the increase in revenue for 1903, at an average advance of 10 cents per ton, would be a little over \$10,000,000. There appear to have been no material advances in the rates on anthracite coal during the period in question.

In June, 1903, the rates on lumber and other forest products from all lumber-producing points in the southern territory east of the Mississippi River to Ohio River points and points north thereof, also from points in Arkansas, Louisiana, and Texas to the same territory, were advanced 2 cents per 100 pounds. For the year ending June 30, 1902 (figures for 1903 not yet available) the total tonnage of lumber and other forest products was 67,703,050 tons, of which it is estimated that about 20,000,000 tons originated in the territory above described. Assuming that there has been no falling off in tonnage, the increase in revenue for the nine months the advanced rates have been in force, at an advance of 2 cents per 100 pounds, or 40 cents per ton, would be about \$6,000,000.

Grain and grain products constitute an important part of the freight traffic of the country, the tonnage for the year ending June 30, 1902, being 36,813,857 tons. The fluctuation in the rates on these commodities during the last four years, however, has been such as to render an estimate of the effect of such changes on railway revenue impracticable. The rates on this traffic for a large portion of the country are based on the rates from Chicago to New York. The following table shows the changes in the rates on wheat and flour, carloads, from and to the points named, since January 1, 1900, to the present time:

|  | Cents per 100 pounds. |
|--|-----------------------|
| January 1, 1900.....                   | 22                    |
| March 5, 1900.....                     | 15                    |
| November 1, 1900.....                  | 17½                   |
| June 1, 1901.....                      | 15                    |
| October 21, 1901.....                  | 17½                   |
| December 8, 1902.....                  | 20                    |
| May 11, 1903.....                      | 18                    |
| December 1, 1903, to present date..... | 20                    |

As will be seen, the rate in force January 1, 1900 (which became effective November 1, 1899), was higher than at any subsequent date, while for a considerable portion of the time the rates on this traffic were on the basis of 15 cents per 100 pounds Chicago to New York.

Respectfully submitted.

J. M. SMITH, Auditor.

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Statement showing the total number of tons of freight carried by the railroads of the United States for the fiscal years ending June 30, 1899, 1900, 1901, 1902, and 1903, with the total revenue accruing therefrom; also the revenue which would have accrued at the average rate of 95.2 cents per ton for the years ending June 30, 1900, 1901, 1902, and 1903, this being the average rate for the year ending June 30, 1899; and the increase in the revenue for the years 1900, 1901, 1902, and 1903 resulting from the increase in the average rate per ton for those years.

| Year ending June 30—    | Number of tons of freight carried. | Total freight revenue as charged. | Amount of freight revenue at average rate per ton of 95.2 cents, being the average rate for the year ending June 30, 1899. | Increase.   |
|-------------------------|------------------------------------|-----------------------------------|--|-------------|
| 1899 .....              | 959,763,583                        | \$913,737,155                     | \$913,737,155  | .....       |
| 1900 .....              | 1,101,680,238                      | 1,049,256,323                     | 1,048,799,587  | \$456,736   |
| 1901 .....              | 1,089,226,440                      | 1,118,543,014                     | 1,036,943,571  | 81,599,443  |
| 1902 .....              | 1,200,315,787                      | 1,207,228,845                     | 1,142,700,629  | 64,528,216  |
| 1903 <sup>a</sup> ..... | 1,221,475,948                      | 1,318,320,604                     | 1,162,845,102  | 155,475,502 |

<sup>a</sup> The figures given for the year 1903 represent about 98 per cent of the total mileage.

## PART II.

Summary showing gross earnings, operating expenses, ratio of operating expenses to earnings, mileage operated, etc., of the railways in the United States, for the years ending June 30, 1899, 1900, 1901, and 1902.

| Item.  | 1899.           |   |                            | 1900.           |   |                            | Increase, 1900 over 1899. |           |
|--|-----------------|---|----------------------------|-----------------|---|----------------------------|---------------------------|-----------|
|  | Amount.         | Proportion to total operating expenses. | Per mile of line operated. | Amount.         | Proportion to total operating expenses. | Per mile of line operated. | Amount.                   | Per cent. |
|  |                 | P. ct.                                  |                            |                 | P. ct.                                  |                            |                           |           |
| Gross earnings from operation .....                | \$1,313,610,118 | .....                                   | \$7.06                     | \$1,487,044,814 | .....                                   | \$7.722                    | \$173,434,696             | 13.20     |
| Operating expenses:                                |                 |   |                            |                 |   |                            |                           |           |
| Maintenance of way and structures .....            | 180,410,806     | 21.05                                   | 962                        | 211,220,521     | 21.97                                   | 1,097                      | 30,809,715                | 17.08     |
| Maintenance of equipment .....                     | 150,919,249     | 17.62                                   | 805                        | 181,173,880     | 18.84                                   | 941                        | 30,254,631                | 20.05     |
| Conducting transportation .....                    | 486,159,607     | 56.73                                   | 2,533                      | 529,116,326     | 55.04                                   | 2,748                      | 42,956,719                | 8.84      |
| General expenses .....                             | 38,676,883      | 4.51                                    | 206                        | 39,328,765      | 4.09                                    | 204                        | 651,882                   | 1.69      |
| Unclassified .....                                 | 802,454         | .09                                     | 4                          | 589,019         | .06                                     | 3                          | \$213,435                 | \$26.00   |
| Total operating expenses .....                     | 856,968,999     | 100.00                                  | 4,570                      | 961,428,511     | 100.00                                  | 4,993                      | 104,459,512               | 12.19     |
| Percentage of operating expenses to earnings ..... | 65.24           | .....                                   |                            | 64.65           | .....                                   |                            |                           |           |
| Mileage operated (single track) .....              | 187,534.68      | .....                                   |                            | 192,556.03      | .....                                   |                            |                           |           |

<sup>a</sup> Decrease.

PART II.—Summary showing gross earnings, operating expenses, etc.—Continued.

| Item.  | 1901.           |  |                                    | Increase, 1901<br>over 1900. |              |
|--|-----------------|--|------------------------------------|------------------------------|--------------|
|  | Amount.         | Proportion to total<br>operating expenses. | Per<br>mile of line op-<br>erated. | Amount.                      | Per<br>cent. |
|  |                 | P. ct.                                     |                                    |                              |              |
| Gross earnings from operation .....                | \$1,588,526,087 |  | \$8,123                            | \$101,481,223                | 6.82         |
| Operating expenses:                                |                 |  |                                    |                              |              |
| Maintenance of way and structures .....            | 231,056,602     | 22.42                                      | 1,182                              | 19,836,061                   | 9.39         |
| Maintenance of equipment .....                     | 190,299,560     | 18.46                                      | 973                                | 9,125,680                    | 5.04         |
| Conducting transportation .....                    | 565,235,759     | 54.87                                      | 2,860                              | 36,149,468                   | 6.88         |
| General expenses .....                             | 42,568,553      | 4.13                                       | 218                                | 3,237,788                    | 8.23         |
| Unclassified .....                                 | 1,208,766       | .12  | 6                                  | 619,747                      | 105.22       |
| Total operating expenses .....                     | 1,030,397,270   | 100.00                                     | 5,269                              | 68,968,759                   | 7.17         |
| Percentage of operating expenses to earnings ..... | 64.86           |  |                                    |                              |              |
| Mileage operated (single track) .....              | 195,581.92      |  |                                    |                              |              |
|  |                 |  |                                    |                              |              |
| Item.  | 1902.           |  |                                    | Increase, 1902<br>over 1901. |              |
|  | Amount.         | Proportion to total<br>operating expenses. | Per<br>mile of line op-<br>erated. | Amount.                      | Per<br>cent. |
|  |                 | P. ct.                                     |                                    |                              |              |
| Gross earnings from operation .....                | \$1,726,380,267 |  | \$8,625                            | \$137,854,230                | 8.68         |
| Operating expenses:                                |                 |  |                                    |                              |              |
| Maintenance of way and structures .....            | 248,381,594     | 22.25                                      | 1,241                              | 17,324,992                   | 7.50         |
| Maintenance of equipment .....                     | 213,380,644     | 19.12                                      | 1,066                              | 23,081,084                   | 12.13        |
| Conducting transportation .....                    | 609,961,895     | 54.64                                      | 3,047                              | 44,695,908                   | 7.01         |
| General expenses .....                             | 44,197,880      | 3.96                                       | 221                                | 1,631,327                    | 3.83         |
| Unclassified .....                                 | 326,934         | .03  | 2                                  | 881,832                      | a 72.95      |
| Total operating expenses .....                     | 1,116,248,747   | 100.00                                     | 5,577                              | 85,851,477                   | 8.83         |
| Percentage of operating expenses to earnings ..... | 64.66           |  |                                    |                              |              |
| Mileage operated (single track) .....              | 200,154.56      |  |                                    |                              |              |

a Decrease.

Further, in respect to advances and reductions in Southern territory, I have a communication recently addressed to me (January 13) by the president of the King Hardware Company, of Atlanta, Ga., in which he states differences in rates on a comparatively unimportant commodity—coffee mills (although this commodity, as a matter of fact is quite an important one in the hardware trade)—which I will not read, but it shows excessive rates to Atlanta as compared with Nashville from Columbus, Ohio; Freeport, Ill., and Meriden, Conn., to which he attaches a statement of changes in classification of various articles of hardware, showing the percentage of increase in rates, as per Southern classification No. 25, which is the classification that was in force in February, 1900, when these advances in classification

were first commenced to be made, extending up to November in that same year, as compared with the current classification, No. 32, now in force, based on current rates from Cincinnati, Ohio, to Atlanta, Ga., in which the former classification and rates and changes in classification and rates are given on thirty-nine different articles of hardware, and the percentage of advance in consequence of that change in classification is shown for each, the result of which is that on the thirty-nine articles the advance in rate arising from changes in classification ranges from 13.1 to 84 per cent, and the average increase, counting the number of articles, without taking the tonnage into consideration (which it is impossible to arrive at), is 34.5 per cent. I will file this also with the committee.

OFFICE OF KING HARDWARE COMPANY,  
Atlanta, Ga., January 13, 1905.

E. P. BACON, *Washington, D. C.*

DEAR SIR: If the papers reported Mr. Spencer correctly on yesterday, it would seem that he had overlooked the true situation with regard to the effect of some changes in the classification.

During a recent period of time, instead of everything being reduced, we herewith inclose a tabulated statement showing the increase in the percentage due to some of these reclassifications.

As an evidence of what some distributing points suffer in the way of discriminations, beg to hand you below a table showing current rates on coffee mills to Atlanta, Ga., and to Nashville, Tenn.:

*Coffee mills.*

|  |         |
|--|---------|
| From Columbus, Ohio, to—                     |         |
| Atlanta, Ga.....                             | \$1. 24 |
| Nashville, Tenn.....                         | . 66    |
| Nashville, Tenn. (carload).....              | . 49½   |
| From Freeport, Ill., to—                     |         |
| Atlanta, Ga.....                             | 1. 26   |
| Nashville, Tenn.....                         | . 67    |
| From Meriden, Conn., to—                     |         |
| Atlanta, Ga.....                             | 1. 09   |
| Nashville, Tenn. <sup>a</sup> .....          | . 78    |
| Nashville, Tenn. <sup>a</sup> (carload)..... | . 42    |

We have taken the most prominent shipping points in the West, Middle West, and East.

Very truly, yours,

W. E. NEWILL, *Vice-President.*

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<sup>a</sup> These frequently move via Atlanta.

# PROPOSED AMENDMENT OF INTERSTATE-COMMERCE LAW. 379

*Statement of changes in classifications of hardware, showing percentage of increase in rates, per Southern classification No. 25, compared with current classification No. 32, based on current rates from Cincinnati, Ohio, to Atlanta, Ga.*

[Less than car load, L. C. L.; car load, C. L.]

|         |     |    |    |    |    |    | Special iron. |          |
|---------|-----|----|----|----|----|----|---------------|----------|
|         |     |    |    |    |    |    | C. L.         | L. C. L. |
| Classes | 1   | 2  | 3  | 4  | 5  | 6  | 31            | 37       |
| Rates   | 107 | 92 | 81 | 68 | 56 | 46 |               |          |

  

|  | Old classifica-<br>tion No. 25,<br>released. |       | New classifica-<br>tion No. 32,<br>released. |       | Percentage of<br>increase. |       |
|--|--|-------|--|-------|----------------------------|-------|
|  | L. C. L.                                     | C. L. | L. C. L.                                     | C. L. | L. C. L.                   | C. L. |
| Agate ware, granite or enameled ware, iron or steel stamped, in boxes  | 3  |       | 2  |       | 13.6                       |       |
| Axes   | 4  |       | 3  |       | 19.1                       |       |
| Belting, viz:  |  |       |  |       |                            |       |
| Cotton   | 4  |       | 2  |       | 35.3                       |       |
| Rubber   | 3  |       | 2  |       | 13.6                       |       |
| Earthenware, in crates or hogsheads  | 5  |       | 4  |       | 21.4                       |       |
| Forges, portable   | 3  |       | 2  |       | 13.6                       |       |
| Fruit jars   | 4  |       | 3  |       | 19.1                       |       |
| Grease, axle   | 6  |       | 4  |       | 48                         |       |
| Grindstones, without fixtures  | 6  |       | 5  |       | 21.7                       |       |
| Handles, n. o. s.  | 4  |       | 3  |       | 19.1                       |       |
| Hatchets, boxed  | 4  |       | 3  |       | 19.1                       |       |
| Iron or steel articles, viz:   |  |       |  |       |                            |       |
| Axles, carriage or wagon, loose or wired together  | 51   |       | 5  |       | 51                         |       |
| Bolts, nuts, rivets, and washers, in kegs, casks, or barrels   | 51   |       | 5  |       | 51                         |       |
| Brackets, shelf, n. o. s.  | 4  |       | 3  |       | 19.1                       |       |
| Boxes and skeins, in kegs, barrels, or loose   | 51   |       | 5  |       | 51                         |       |
| Castings, not part of machinery, each piece weighing less than 15 pounds   | 5  |       | 2  |       | 64.3                       |       |
| Chain belting, rel. val. 2¢ # in barrels   | 6  |       | 3  |       | 76                         |       |
| Same, in boxes or barrels, n. o. s.  | 5  |       | 3  |       | 44.6                       |       |
| Chains, iron, in barrels or casks, rel. val. 2 cents per pound   | 51   | 51    | 5  |       | 51                         | 30    |
| Crowbars   | 51   | 51    | 6  | 6     | 24.3                       |       |
| Harrow teeth, in kegs or barrels   | 51   |       | 6  |       | 24.3                       |       |
| Nails, in kegs   | 51   |       | 6  |       | 24.3                       |       |
| Hooks, backband, in kegs, barrels, or casks  | 5  |       | 4  |       | 21.4                       |       |
| Lap rings  | 51   |       | 4  |       | 84                         |       |
| Picks and mattocks, in barrels or kegs   | 51   | 51    | 4  | 4     | 84                         | 120   |
| Plow irons, clevises, frogs, heel bolts, molds, plant fenders, plates, paints, and wings, in barrels, kegs, or casks | 51   |       | 6  |       | 24.3                       |       |
| Sadirons, in barrels or casks, with contract that no other articles should be put in same                            | 51   | 51    | 4  | 6     | 84                         | 50    |
| Shoes, horse and mule, in kegs   | 51   |       | 6  |       | 24.3                       |       |
| Staples, fence, in kegs  | 51   |       | 6  |       | 24.3                       |       |
| Tires, wagon   | 51   |       | 6  |       | 24.3                       |       |
| Wire, iron or steel, in barrels, coils, or reams   | 51   |       | 6  |       | 24.3                       |       |
| Wedges, without handles  | 51   |       | 4  |       | 84                         |       |
| Lamp and lamp goods, packed  | 2  |       | 1  |       | 16.4                       |       |
| Leather  | 3  |       | 2  |       | 13.1                       |       |
| Nails, horse and mule, in boxes  | 5  |       | 4  |       | 21.4                       |       |
| Rope, cotton   | 5  |       | 4  |       | 21.4                       |       |
| Shot, in kegs or in double sacks   | 6  |       | 5  |       | 21.7                       |       |
| Tinware  | 3  |       | 2  |       | 13.6                       |       |
| Spring vehicle   | 6  |       | 4  |       | 48                         |       |

Thirty-nine articles. Increase in rates arising from change in classification, 13.1 to 84 per cent. Average increase, 34½ per cent.

I also received copy of a statement from a very large lumber corporation in Mississippi, signed by Silas W. Gardiner, one of the owners of the corporation, in which he shows the advances made in rates of freight on lumber for ten years, which I will not stop to read, but will file with the committee. It shows an advance of 4 cents per hundred pounds from the lumber district of Georgia, Ala-



bama, and Mississippi to points north of the Ohio River since the year 1898. I will not take the time of the committee to read anything further from that.

The paper referred to is as follows:

DECEMBER 22, 1904.

Senator W. B. ALLISON, *Washington, D. C.*

DEAR SIR: I write to urge upon your attention and favorable consideration the enactment of legislation at this session of Congress giving to the Interstate Commerce Commission the power suggested by the President in his late message to Congress.

The railroads of this country have, by consolidation of interests and mergers, so entrenched and strengthened themselves, and have in so many instances made tyrannous use of their power, that conditions in many lines of business and manufacture are well-nigh intolerable. They claim the sole power to make rates and classifications, and in recent contests, where opposition has been made in this vicinity to arbitrary advances in rates on lumber, they have made the statement that the only criterion as to the justice of a rate made by them was, or is, its publication.

I would state for your information that since the beginning of 1898 rates have been advanced on southern pine lumber to points north of the Ohio River 4 cents per 100 pounds, which means an advance of \$1 to \$1.50 per 1,000 feet, according to the kind of lumber shipped, whether dry and dressed or rough and heavy. This is a tremendous tax to lay upon southern lumber manufacturers, because they have to absorb it in their prices. To make this clear to you I will make the following statement of average prices received by our company for each year from 1893 to 1904, inclusive:

*Statement of average prices per thousand feet received for their lumber production (not including lath) by Eastman, Gardiner & Co., of Laurel, Miss., after deducting freight, for each year from 1893 to 1904, inclusive.*

|            |         |            |         |
|------------|---------|------------|---------|
| 1893 ----- | \$0. 37 | 1899 ----- | \$9. 71 |
| 1894 ----- | 8. 14   | 1900 ----- | 10. 27  |
| 1895 ----- | 8. 83   | 1901 ----- | 10. 83  |
| 1896 ----- | 8. 24   | 1902 ----- | 11. 89  |
| 1897 ----- | 7. 99   | 1903 ----- | 11. 32  |
| 1898 ----- | 8. 79   | 1904 ----- | 10. 64  |

When you consider that wages have advanced 25 per cent and pine timber lands 100 per cent during the above period, you will see that lumbermen are not and have not been in any condition to bear these heavy advances in freight rates.

To assure you of the correctness of the above statement, we shall be willing to submit the same to you or anyone else by affidavit, and you can further confirm the statement in a general way by interviewing any of the northern lumber dealers who are and have been handling southern pine lumber for a number of years.

This additional burden of freight rates over that of 1898 and previous, amounts to \$40,000 or more on our shipments alone annually, and to millions of dollars on southern pine going into northern States.

In view of the facts above presented, I most earnestly hope you will give your support to the endeavors that are being made to enable the Interstate Commerce Commission to name a just and fair rate when complaint is made that in their judgment is unfair and unjust.

We are Iowa people, having been in business there many years, and my home is in Clinton yet. I therefore feel justified in appealing to you as a constituent to give full consideration to this great question.

Very respectfully, yours,

SILAS W. GARDINER.

I want to bring out one point in connection with the result of these advances as compared with the increase in operating expenses, the result of which it seems to me is shown more conclusively and defi-

nately by the actual net earnings of the railways of the country during the period in question than by any comparison of figures, either in rates of freight or wages or other expenses of operation. The increase in net earnings, as shown by the annual statistical reports of the Interstate Commerce Commission, between the years 1899 and 1903 amounts to \$184,989,077. That is the increase in net earnings for the four years in question. That is an increase of 40.5 per cent on the earnings of the preceding year. The increase in mileage during that time was 7.42 per cent.

Mr. MANN. That is single-track mileage, is it?

Mr. BACON. Single-track mileage, certainly; the length of the railroads, which is always what is counted. The 200,000 miles of railroad—a little over that—now in existence is what we take into account.

Mr. MANN. That takes no account of double tracking?

Mr. BACON. No; it simply takes the length of the railroads, the increase in length of lines, which is 7.42 per cent during that period.

The CHAIRMAN. Does your paper give the tonnage of the two periods?

Mr. BACON. Yes, sir. I will come to that directly. The increase in tonnage of freight during the same period was 10.9 per cent. The increase in freight revenue during the same period was 25.6 per cent. Those are final and conclusive figures, as I say, which show the real result of the advances in rates on one hand and increase in expenses on the other, showing an increase in tonnage of 10.9 per cent and an increase in freight revenue of 25.6 per cent.

Mr. MANN. Have you made any comparison anywhere, Mr. Bacon, as to the percentage of dividends, compared with the receipts for the two respective periods?

Mr. BACON. I have not any figures of that kind at hand, Mr. Mann. I can obtain them if desired, but there is no time at present to do so. I will say, generally speaking, however, that dividends have ranged all the way from nothing up to 8 per cent—dividends on the stock of the various railway companies—and that the net earnings of many of the railways, according to the figures published, show as high a net result as from 10 to 20 per cent on the capital stock applicable to dividends; but the dividends themselves have not been increased above the customary rate for some years past (the customary rate being 6 or 8 per cent) except in some individual cases where 1 per cent additional may have been declared, or in the case of some railroad companies that have not been paying dividends previously, they have paid a small dividend during the past few years.

Mr. MANN. Do your tables show what percentage of net to gross receipts there has been for the two periods you have named?

Mr. BACON. Of gross receipts?

Mr. MANN. What the percentage of net is to the gross receipts?

Mr. BACON. I have not that with me; no, sir; I have figures of that kind, but they do not come to my mind with sufficient clearness to undertake to state them.

The CHAIRMAN. Is there any considerable number of miles of railways that pay no dividends?

Mr. BACON. I could not say what percentage it constitutes, but there is a large number of railways that never have paid dividends and never will.

The CHAIRMAN. Can you approximate the percentage of the whole mileage?

Mr. BACON. I could not.

The CHAIRMAN. That have not paid dividends?

Mr. BACON. I have never attempted to do that. But in such cases it arises generally from the fact that the railroads have been enormously overcapitalized, and in other cases from the fact that the roads were unnecessary, that they were built to parallel other lines, or were built expensively, and, as I said before, under an excessive capitalization—a great overcapitalization. I could give the committee those figures if desired, but I am unable to do so at the present.

One point I wish to bring to the cognizance of the committee, is what appears to me to be a misapprehension as to the probability of the number of cases of litigation that would be likely to arise under the change in the law which it is proposed to make. It appears to me that the very fact of the existence of the power which it is proposed to confer upon this Commission will operate to a very large extent in deterring the carriers from imposing rates upon the traffic which they can not defend before the Interstate Commerce Commission. In the next place it will operate largely to put the shipper upon a parity with the carrier in attempted negotiations between them as to the adjustment of rates which are deemed by the shipper to require adjustment. As it is now it is entirely in the hands of the carrier as to whether to make concessions when desired by the shipper or not, and as a matter of fact if they do make any concessions they make only a small proportion of what the shipper considers himself entitled to, the fact of the matter being that the final and ultimate decision of the case is wholly in the hands of the one party, and he will grant such concessions as he deems his interests require, or as he deems necessary to pacify the complainant; but if this power exists in the hands of the Commission to take this case up and say just what shall be done to adjust this difficulty between them, the complainant or the shipper occupies a position, in a certain respect at least, of treating with the carrier upon common ground, the carrier realizing that if he does not yield what is reasonable and proper the complainant can take the case to an independent or an impartial tribunal that will compel them to do it.

Hence, I think the number of cases that will come before the Commission under this law is very greatly overestimated and that the Commission will have no difficulty in handling the cases that will be brought before it. Furthermore, I wish to say that I think that the courts that are already provided will find no difficulty in dealing with these cases, and it will be very much preferable to the interests that I represent—the commercial organizations of the country—if the establishment of a separate court to treat these cases were left for after consideration. Wait until the operation of the law demonstrates the necessity, if there be one, for the establishment of additional courts. It will be a year, at least, before any case can be gotten through the Interstate Commerce Commission after the enactment of this law, should it be enacted, and during that time, if it appears that there is any necessity for additional courts, Congress will meet and there will be opportunity to provide them. Furthermore, I would like very much—I say “I;” I speak for the interests I represent—we would like very much to see this question of whether or not this

power is to be vested in the Commission presented to Congress entirely independent of any other proposition.

Let Congress say whether it deems best to confer this power upon the Commission, and let that be said independent of any other question. And then, if it desires to do so, and decides to do so, after that has gone into effect the necessary court machinery can be provided for it in ample time and it will divest the question of very serious complications.

I have heard many members of Congress and some members of the Senate object very seriously to the enlargement of the courts of the country, the enlargement either of the circuit courts by an additional judge for each, or the establishment of any new court. That question is going to involve this main question in great difficulty, and it seems to me it will be to the interests of the country, it will be to the advantage of Congress, to determine the one question first by itself, without reference to any other; and I sincerely commend the consideration of this point to this committee.

Mr. ADAMSON. I understand you mean if we can secure the enactment of the first section of most of these bills you will consider that we have made great progress?

Mr. BACON. That is it; great progress; and it will be settled without complicating it with any other issue. That is very desirable, I think. Congress ought to have the opportunity to pass upon that one question entirely independent of any other. It is the great question before this country to-day, and if Congress is placed in a position where it can treat upon that question without complication or reference to any other we will get a fair and more satisfactory expression, certainly, of the attitude of Congress in relation to this question.

Mr. MANN. Is your opposition to the court proposition an opposition based on the prospect of legislation or an opposition to the proposition itself?

Mr. BACON. It is in the belief that it is unnecessary and a belief that it is better to wait until the necessity for it demonstrated, but primarily because it will involve the main question and because Congress will not be able to act upon that question by itself. That has been so long before the country that it seems to me that Congress is entitled to the opportunity to treat the question by itself, independent of any other.

Mr. ADAMSON. Do you not believe that if certainty and expedition are secured in the law that it will result in a diminution of litigation anyhow?

Mr. BACON. That is what I previously stated.

Mr. ADAMSON. I had forgotten that.

Mr. BACON. That is what I first stated.

Mr. MANN. I have always understood from you, Mr. Bacon, that the principal trouble was discrimination between localities and between commodities. That is a discrimination which the railroad companies can not remedy without the consent of the localities or the shippers of the commodities.

Mr. BACON. For that very reason it should be referred to an independent tribunal to decide for them. There are a great many claims of that kind, where one community is jealous of another, that are not well founded.

Mr. ADAMSON. And would not that require the Commission to act?

Mr. BACON. Certainly.

Mr. ADAMSON. You think that would require the Commission to act?

Mr. BACON. Yes; but, as I say, it will take a year or more to reach a decision by the Commission. That has been the history of the cases that have been before the Commission—it will take a year at least to decide a case, to take the testimony and hear the arguments and bring the case to a conclusion. I do not think there has been a case decided before the Commission in less than a year. A majority of the cases—the great bulk of the cases, in fact—take from one to three years. It is very rare that a case is settled in as short a time as a year, and it is very improbable that you would get any cases for this new court to take hold of within a year from the date of the enactment of the law.

Mr. ADAMSON. I was speaking of two communities. One of them thinks the other has the better of it. If the railroad company changes its rate, then the first community will think the other has the better of it. Is not that a question to be tried by the Commission?

Mr. BACON. Yes; to be sure.

Mr. ADAMSON. Will not that make a good deal of litigation?

Mr. BACON. I do not call that litigation, but the consideration of the question by the Commission whether discrimination exists or not.

Mr. ADAMSON. I mean litigation before the Commission.

Mr. BACON. It will not tend to increase those cases; no. The fact is, as I have said, that the Commission having power to deal with them they will be satisfactorily adjusted between shippers and the carriers in nine cases out of ten.

Mr. ADAMSON. Excuse me, but I do not see how it is possible for the railroad companies and the shippers to settle it, when it is a rivalry between communities, without going to the Commission.

Mr. BACON. They often do settle it now.

Mr. ADAMSON. They have not had any tribunal to go to.

Mr. BACON. They are not complaining about it now. The Commission has treated those cases during all the time since its organization, but the difficulty is that its decisions are not operative; they are merely opinions which are expressed.

I want to say a word in relation to a defect which it strikes me exists in the Hepburn bill, which has been just introduced, which I want to call the attention of the committee to, and that is the provision or the absence of any provision in reference to additional testimony which either party may desire to present when the order of the Commission is under review by the court. There has been great difficulty arising heretofore, as you well know, in consequence of the fact that new testimony has been introduced before the court which has not been before the Commission, and has practically made a new case of it, and consequently the Commission has been overruled in its previous decision; whereas if it had had that additional testimony it might have made an entirely different decision. I want to cite to the committee the declaration of the Supreme Court on that point in the case of the Cincinnati and New Orleans and Texas Pacific Railway Company against the Interstate Commerce Commission, 162

United States reports, page 194, etc. This is from Mr. Kernan [reading]:

The Supreme Court of the United States has condemned the present practice proposed to be continued under the Cooper-Quarles bill and has in substance approved of the change that I propose in the following language:

"We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as shall lead them to withhold the larger part of their evidence from the Commission and first adduce it in the circuit court. The Commission is an administrative board and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in court or when the orders of the Commission have been disregarded. The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the Commission."

That ends the quotation from the opinion of the court, but following this is a paragraph which is from a paper written by Hon. John D. Kernan, former chairman of the railway commission of the State of New York, who appeared before this committee in 1902 and gave testimony in regard to the desirability of this legislation. I will say also that he is given the credit of being the author of the present interstate-commerce act to a very large extent, the author of it in the main, in fact. He says:

It would greatly facilitate and cheapen the cost of proceedings and promote justice to have all the evidence taken before the Commission. If parties understood that the holding back of their evidence would only result in their being sent back to offer it before the original tribunal there would cease to be any such withholding in the first instance, and yet there would not be denied to parties the opportunities to supply omissions caused by accident or by changed conditions.

I want also to refer to one other point in the Hepburn bill. That is the fact that it is provided that an appeal to the Supreme Court shall not operate to stay the order of the commerce court, provided a bond is filed to protect the parties interested. It says:

But in none of the suits or proceedings described in this section shall an appeal operate as a supersedeas or shall any order be passed suspending or setting aside the decree of the court of commerce upon an appeal except upon the giving of a bond of good and sufficient security, conditioned that the appellant shall prosecute his appeal to effect, and if he fail to make his plea good shall answer, in addition to all costs, all damages, which shall include compensation for whatever sums for transportation service any person or corporation shall be compelled by the appellant to pay during the pendency of the appeal in excess of the sums such person or corporation could have been compelled to pay if the order, judgment, or decree of the court of commerce had not been suspended or stayed, which compensation may be recovered in an action of debt upon such bond brought in the name of the United States in any court of proper jurisdiction for the use of the person or corporation from whom or from which the excessive tolls shall have been collected.

I want to say, in the first place, that a bond provided in that case, or the fact of the providing of a bond in that case, is very delusive, for the reason that it will be next to impossible, probably in ninety-nine out of a hundred cases actually impossible, to reach the party that has suffered in consequence of the continuance of this rate that has been found by two bodies—the Interstate Commerce Commission in the first place and the transportation or the commerce court, as the case may be, in the second place—to be unjust and unreasonable.

Mr. ADAMSON. If that condition applies to every shipper whether he be a party to the record or not, will not that be sufficient?

Mr. BACON. The difficulty lies in the fact that the shipper is not the interested party—

Mr. ADAMSON. I understand; I say if that applies to everybody that ships, whether he is a party to the record or not.

Mr. BACON. The bond would require the railway company to refund to the man who has paid the freight the excess over the rate that had been fixed by the Commission; but in the meantime the man who has paid the freight, either the shipper or the consignee, as the case may be, has no remaining interest in it whatever. In the case of the consignee who has received goods for sale, he has sold them to the retailer and has added the freight which he has had to pay into the price of the goods he has disposed of, and the retailer passes them over to the consumer and the consumer pays that freight in the price of the goods which he purchases. He can not be reached. It would be impossible to trace even in the case of a single shipment the party that is really entitled to the money, and nobody has any standing at law in the case except the one who has paid it, who holds the expense bills, as they are called, of the railroad company, which he obtained when he paid the freight.

Mr. ADAMSON. Suppose—

Mr. BACON. Allow me a few words further. I want to trace this a little further. In the case of the shipper—we will say a shipper of agricultural products, agricultural products being principally the things that the shipper deals in, although manufacturers also are shippers; but in case of manufacturers the freight paid goes right into the product itself and is paid by the consumer finally, the same as in the case of merchandise, which I referred to previously—the price paid by the shipper, that is the price paid by the buyer of agricultural products in the country. You all understand, of course, that there are very few men who raise agricultural products and ship them themselves; they sell them at the nearest railway station to the local buyer, and the buyer ships them to market, and he pays the freight; that is, the freight is paid at the point of destination and is deducted from the account of sales that is rendered to the shipper. So the shipper really pays the freight and gets his expense bill back from his commission merchant or consignee, so that he is the only one entitled to recover under the bond in the case of agricultural products. That is the case with grain, cotton, hay, and other things; it is the case largely with fruit; it is the case with every agricultural product that is the subject of transportation, and the shipper takes the freight which he has to pay to market directly out of the farmer or producer when he buys the articles and takes them into his possession for shipment. So that the man who really bears the freight—bears it in the price he accepts for his products—has no standing in court, and, as in the other case, is not known and can not be known—can not be traced up; hence, the payment under the bond would go to parties who have no earthly claim whatever to it, having recouped themselves already fully, both in the case of the wholesale dealer who handles merchandise and the shipper of manufactures, and also in the case of the grain buyer or cattle buyer who has bought the product of the country from the producer, all of them having fully indemnified themselves and are not entitled to another cent from any source whatever.

There is this advantage in the existence of such a bond. It would remove the present incentive from the carrier to prolong the litigation in the courts, because during the prolongation of that litigation as the law is now he is receiving the benefit of these excessive rates, which have been so found by these two bodies to which I have referred, and it is desirable to have the bond on that account. But I say let the excess in freight which is found, in case the order of the Commission is finally sustained, be paid to the Government. Nobody has any claim to it; consequently give it to the Government and it could go toward meeting the expense of this Commission.

Mr. MANN. Would that be the case in the case of discriminatory rates between localities?

Mr. BACON. Yes; precisely.

Mr. ADAMSON. I thought you were going to state the converse of this situation. In case the official judgment is in favor of the railroads and the railroads sue the shipper and get back the difference that he ought to have paid, how is the company to recoup itself? Who is going to be liable for that?

Mr. BACON. If he is going to be liable in the future for the payment of the difference between the rate fixed by the Commission and the one finally decided upon, he is going to indemnify himself in advance.

Mr. ADAMSON. How would you know that he is solvent?

Mr. BACON. To be sure, and for that reason he is going to protect himself by putting it into the price of the goods he handles.

The CHAIRMAN. Do you think, Mr. Bacon, from your knowledge of railways, that where an indebtedness to a shipper is fixed in amount by his bill of lading on the one hand and the order of the Commission on the other, in a sum that he can not avoid by any possibility in a court of justice, that he would wait to be sued before he would make prompt payment of a debt of that kind?

Mr. BACON. He would indemnify himself in the outset by putting the freight which he would be liable to pay in the future to the carrier into the price of the goods when he sells them.

The CHAIRMAN. That is, you think when the rate is lowered by the Commission and is in litigation the carrier would increase that rate that he was at that time charging, do you, to recoup?

Mr. BACON. It may be that way, or it might be that he would keep the lower rate in effect and hold the party who paid the freight liable to him for the subsequent payment of the difference.

The CHAIRMAN. Is that practicable?

Mr. BACON. I do not consider either of them practical; no, sir; but if such were the case the shipper would necessarily protect himself by putting the rate that he would ultimately be liable to pay on the property which he handled. He would be ruined in a year's time if he did not do it in any business that I know anything about.

The CHAIRMAN. Suppose, on the other hand, that the action of a commission is not sustained, and that the rate is held to be unreasonable. What is the remedy of the carrier?

Mr. BACON. The carrier would probably protect itself by continuing the rate in question in force. That would be his natural and almost necessary course.

The CHAIRMAN. In that event, what remedy would the shipper have?



Mr. BACON. The shipper in any case protects himself by adding the freight that he has either paid or is liable to pay into the cost of the goods, the price of the goods which he handles when he sells them, the same as the cotton buyer or the grain buyer or the cattle buyer takes it out in advance from the producer of whom he purchases those products in the country.

Mr. WANGER. Would not the dealer in many instances, if this bond provision became effective, agree with his customers that if the freight rate were reduced so many cents a bushel and that was paid back to him that he would hand it over to his customer?

Mr. BACON. In the case of the grain buyer buying from men he knows in the country, he might do that in some instances or do so in part.

Mr. ADAMSON. If he thought they knew about it?

Mr. BACON. Oh, it would be only a division of it with the other men if he did anything at all, but in all probability he would not attempt anything of the kind.

Mr. MANN. Have you ever considered this phase of it? Suppose the rate fixed by the carrier is held by the court to be unreasonable and it has been in effect since it was fixed by the Commission. I mean the rate fixed by the Commission is held by the court to be unreasonable and it has been in effect. Will the railroad companies have the right to sue the shippers to recover the difference between the actual charge and the rate fixed by the court?

Mr. BACON. It is proposed to put up a bond to protect the carrier in that case.

Mr. MANN. What bill provides that?

Mr. BACON. This provision I have just read, I understand, covers that.

Mr. MANN. No; there is no bond to protect anyone in the position I am putting to you. Suppose there is no bond. Assume a case where there is no bond and the rate is 30 cents a hundred, and the Commission fixes a rate of 25 cents a hundred, and it goes into effect, and the court holds that it is unreasonably low and throws it out—

Mr. BACON. The carrier is not going to put that rate into effect when he is testing it in court.

Mr. MANN. I am assuming that the carrier is required to put it into effect, as he would under some of the bills, and it is in effect by requirement of the law, which the Supreme Court holds to be unreasonable. Now, will the carrier, having been compelled to put a rate into effect which is unreasonably low, have the right to sue the shipper and recover from the shipper the difference between the rate actually paid and the reasonable rate?

Mr. BACON. I should not think he would; no, sir.

Mr. ADAMSON. Would he not, Mr. Mann, unless we prevented it?

Mr. MANN. I am inclined to think, under the decisions of the court, that he might have.

Mr. BACON. That is a legal question; but if that is the case, the shipper would protect himself in the same way I have previously indicated.

Mr. MANN. In that event there is no possible objection. If the shipper did not protect himself in such cases, there is no object in putting the rate into effect so far as the consumer is concerned.

Mr. BACON. I look at it in this way: The act of the Commission under this authority is a legislative act which has been delegated to it by Congress, and it has the same effect as if Congress itself had passed an act to that effect. Hence it is obligatory upon every citizen of the United States, and nobody could recover any damages in consequence of it any more than under any other act of Congress which may subsequently be determined to be unconstitutional by the Supreme Court.

The CHAIRMAN. Have you taken this view of the subject, Mr. Bacon? Suppose that the view that you have expressed here should become law and a railway company without any legislation has its right to enjoin the going into effect of that rate and proceed by the ordinary process of injunction in the methods that we now have of administering justice. According to statements which you have made here it takes from four to six years to conclude a case of that kind.

Mr. BACON. I think it does; yes, sir.

The CHAIRMAN. Heretofore, and it will be the same hereafter in all human probability if present methods are determined upon, and that at the end, we will say of four years, an act of the Commission is sustained. Now what remedy under those circumstances will the shipper have except it be by an individual suit against the railroad company to make his recoveries? Will he have any?

Mr. BACON. I do not think the shipper will have any need—

The CHAIRMAN. Will he not have under the provisions of the bill you referred to?

Mr. BACON. The shipper, in the first place, is going to put himself in the position where he can not suffer loss on either side, and consequently he will not be in a position that he wants any recovery from anybody.

The CHAIRMAN. Perhaps that may be so. I do not know whether it is or not; but there is a class of shippers that does not have that, they ship their own grain, they ship their own cattle, there are scores of them, hundreds of them.

Mr. BACON. In the case of cattle that is the case to a considerable extent, but take the whole traffic of the country and it is not the case in 5 per cent of the tonnage of the country.

The CHAIRMAN. Probably not.

Mr. MANN. I guess they would always find some one who would be willing to ship and buy and not lay up money in the savings bank.

Mr. BACON. Yes; if their capital would admit of it, but, as I say, the capital invested in this business of buying and selling the products of the country is usually very small, and the difference of a few cents a hundred pounds on grain or cattle or anything of that kind would ruin 99 per cent of the men in the business in the course of a year; they are absolutely debarred from taking any risk of that kind to any appreciable extent.

Mr. MANN. You are speaking particularly of the grain trade?

Mr. BACON. No; all classes of farm products.

Mr. MANN. That is largely grain trade.

Mr. BACON. No; that is only one. Cotton is larger than grain. Fruit is growing to be an immense article of production; live stock is another. I could name you probably a dozen articles of equal importance with grain in the traffic of the country.

Mr. MANN. Are the men who actually buy these articles in the country usually men of wealth?

Mr. BACON. No, sir.

Mr. MANN. Don't they generally borrow money in order to carry on their business?

Mr. BACON. To a large extent. Their capital is small and they can not afford to take any risks. A man doing a country business in grain is quite an exceptional man if he has a capital of over \$10,000.

Mr. MANN. They would always find some one to take the risks?

Mr. BACON. No; I don't think so. So far as the grain business is concerned, with which I am most familiar, I can not call to mind a single man who could run a risk for a year of one-eighth of a cent per bushel on the grain which he handles. The amount handled is enormous. A man with \$10,000 capital will handle a million bushels of grain a year, and you will see that a tenth of a cent a bushel on that will soon absorb a large capital.

Mr. MANN. A man who has a country elevator will not handle that much.

Mr. BACON. A man with a capital of \$10,000 will handle pretty near that much.

The CHAIRMAN. We have two more gentlemen here who want to be heard.

Mr. BACON. I am sorry I have not time to take up one or two other points, but I appreciate very much the time that has been given me, and thank the chairman and the committee for their attention.

#### STATEMENT OF MR. S. H. COWAN.

Mr. COWAN. Mr. Chairman and gentlemen, I do not wish to waste your time, but I want to say two or three more words in respect to some matters pertaining to the bills before you.

My judgment, after some years' experience in this matter, and, I believe, a comprehensive knowledge of the statute on this subject and the practice and decisions of the courts, that it would not be necessary to provide for a special court at this time. I have no objection to the principle of a special court. In fact, I am disposed to think that it is probably necessary, as I have expressed myself in public addresses, for the purpose of speeding the determination of the inquiry particularly, and for the purpose of furnishing a court which will acquire special knowledge on the subject by reason of familiarizing itself from day to day and from term to term with the great importance of the subject-matter both in law and fact. I believe the court is probably necessary. I doubt the expediency of undertaking to hamper the passage of a bill giving proper powers to the Commission by including in it provisions respecting the establishment of a court. If it is the desire of the committee to pass a bill which will authorize the Commission to pass upon the lawfulness or reasonableness of a rate of freight—I say, if it is the desire of the committee to do that, it can be written in 75 words, as an amendment, in addition, to section 15 of the act.

Two or three words in two or three different sections ought to be stricken out, probably. For example, that section which establishes a commission of five. If this committee thinks it should be seven it

is easy enough to change that to seven. And in the first section of the act I call your attention to the fact that certain classes of interstate carriage are not governed by the interstate-commerce law. Only those roads which are under a common control for their shipments are under the control of the interstate-commerce act as it exists to-day. The result is when the Texas Pacific, as it did, canceled its live-stock rates in shipments intended for beyond the State, neither the commission of Texas had control nor the Interstate Commerce Commission. Why? Because as to that class of shipment they are not within the arrangement provided for in the first section of this act, which makes it subject to the act to regulate commerce, and, being interstate freight, a State law can not control it. I will not take time to call your attention to decisions where that has been decided, but that is the law. When a short line carrying lumber, for instance, from the South to points north of the Ohio River refuse to make, as I understand has been the case, a joint freight rate, if the first section were changed as I have suggested so as to leave the act to apply to all interstate carriers, then the Commission could determine the rate or any part of the rate for interstate carriage. It would simplify the act very much.

Then, by adding to section 14 or 15 the provision that the Commission shall be empowered to fix a rate of freight in lieu of one found to be in violation of any of the provisions of the act, or any part of a rate or charge for that purpose, you will have given that Commission the power which is necessary now to put an already operating machine in force sufficient to do the work.

Now, then, as to the remedy of the Commission and the railroads. The act provides that the Commission may go before the Supreme Court, and it provides a means by which it can enforce its orders. The law now gives a speedy remedy to enforce the Commission's orders by suit in court. Now, as to the remedy of the railroads in case the Commission's orders shall be unlawful. If the orders of the Commission in a given case are objectionable to the railroads, the railroads in the first place take the risk of the penalty that should be fixed by this addition to section 15 for disobedience—say \$5,000 a day or a less amount if you please. If the railroad feels that the given rate violates its right of property in requiring public service for less than a reasonable compensation, it has its right under the present system of jurisprudence in this country to go before any circuit court of the United States and apply for an injunction to restrain that act of the Commission; nor can this body, in my opinion, prevent the exercise of that constitutional jurisdiction, whether it provides for a special court or not. I may be wrong about that, but that is my judgment.

Mr. ADAMSON. Do you think that it would be right to leave the effect of a penalty open after a court has taken jurisdiction?

Mr. COWAN. Manifestly when a court enjoins the enforcement of that order during the time of that injunction that order can not be enforced.

Mr. ADAMSON. Could it be enforced afterwards?

Mr. COWAN. Not while the injunction is pending, because the injunction protects the road against it. You will find, if you desire to pass this legislation, that a small addition to section 15 of the act will furnish every remedy that is desired and that it will leave open

Mr. BACON: I would like to put the question whether it should be made a part of the record of this movement to secure that the people of this country should be able to raise money enough to pay the interest on the public debt.

<sup>1</sup>Herzog, p. 11. Printed in the last column of the page.

But if  $\mu$  is a central measure, the restriction of  $\mu$  to  $\mathcal{H}$  is again the restriction of a central measure to  $\mathcal{H}$ , and hence  $\mu|_{\mathcal{H}}$  is also a central measure on  $\mathcal{H}$ . The other direction is not

On the other hand, the *in vitro* studies have shown that the release of the active principle from the matrix is not dependent on the pH of the medium. The release of the active principle from the matrix is dependent on the concentration of the active principle in the matrix. The release of the active principle from the matrix is dependent on the concentration of the active principle in the matrix.

[illegible][illegible]

### 394 PROPOSED AMENDMENT OF INTERSTATE-COMMERCE LAW.

Southwestern Lumbermen's Association (comprising Kansas, Missouri, and Oklahoma).

Southwestern Mercantile Association.

Trans-Mississippi Commercial Congress.

Travelers' Protective Association of America.

Western Association of Pine Shippers (comprising Washington, Oregon, Idaho, and Montana).

Western Fruit Jobbers' Association.

Western Retail Implement and Vehicle Dealers' Association (comprising Kansas, Missouri, Colorado, Oklahoma, and Indian Territory).

Western Retail Lumbermen's Association.

Western Merchants and Manufacturers' Association.

Western Association of Shoe Wholesalers.

Winter Wheat Millers' League.

Wholesale Saddlery Association of the United States.

#### STATE AND LOCAL ORGANIZATIONS.

##### ALABAMA.

Birmingham Board of Trade.

Birmingham Commercial Club.

Huntsville Chamber of Commerce.

Huntsville Wholesale Grocers' Association.

Mobile Commercial Club.

##### ARKANSAS.

Arkansas State Board of Trade.

Fort Smith Traffic Bureau.

Gentry Fruit Growers' Association.

Judsonia Fruit and Vegetable Growers' Association.

Little Rock Board of Trade.

Little Rock Merchants' Freight Bureau.

Texarkana Commercial Club.

Texarkana Freight Bureau.

Texarkana Wholesale Grocers' Association.

##### CALIFORNIA.

Associated Wholesale Grocers of California.

California State Board of Trade.

California State Grange, Patrons of Husbandry.

Manufacturers and Producers' Association of California.

Southern California Fruit Exchange.

Southern California Retail Hardware and Implement Association.

Claremont Citrus Union.

Highland Orange Growers' Association.

Humboldt County Chamber of Commerce, Eureka.

Indian Hill Citrus Union, North Pomona.

Associated Jobbers of Los Angeles.

Los Angeles Board of Trade.

Los Angeles Chamber of Commerce.

Los Angeles Merchants and Manufacturers' Association.

Oakland Board of Trade.

Oakland Merchants' Exchange.

Pomona Board of Trade.

Pomona Fruit Growers' Exchange.

Porterville Board of Trade.

Sacramento Board of Trade.

Sacramento Chamber of Commerce.

San Antonio Fruit Exchange, Pomona.

San Bernardino Board of Trade.

San Bernardino County Fruit Exchange, Colton.

San Diego Chamber of Commerce.

San Francisco Chamber of Commerce.

San Francisco Merchants' Association.

San Francisco Merchants' Credit Association.

Santa Barbara County Chamber of Commerce, Santa Barbara.  
Santa Barbara Lemon Growers' Exchange.  
Tulare County Citrus Fruit Exchange, Porterville.  
Whittier Citrus Union.

COLORADO

Colorado and Wyoming Lumber Dealers' Association.  
Colorado State Realty Association.  
Colorado City Chamber of Commerce.  
Colorado Springs Chamber of Commerce.  
Denver Chamber of Commerce and Commercial Club.  
Denver Manufacturers' and Jobbers' Transportation Association.  
Denver Real Estate Exchange.  
Fort Collins Sheep Feeders' Association.  
Grand Junction Chamber of Commerce.  
Grand Junction Liberty League.  
Gunnison County Stock Growers' Association, Gunnison.  
Lincoln County Cattle Growers' Association, Hugo.  
Lincoln and Elbert County Wool Growers' Association, Hugo.  
Roaring Fork and Eagle River Stock Growers' Association, Carbondale.

CONNECTICUT.

Connecticut State Grange, Patrons of Husbandry.  
Bridgeport Business Men's Association.  
New Haven Chamber of Commerce.  
Waterbury Business Men's Association.

DISTRICT OF COLUMBIA.

Washington Board of Trade.

FLORIDA.

Georgia Interstate Saw Mill Association (comprising Georgia and Florida).

GEORGIA.

Georgia Interstate Saw Mill Association (comprising Georgia and Florida).  
North Georgia Fruit Growers' Association.  
Atlanta Chamber of Commerce.  
Atlanta Freight Bureau.  
Savannah Cotton Exchange.

IDAHO.

Eastern Washington and Northern Idaho Lumber Manufacturers' Association.  
Idaho Lumber Dealers' Association.  
Idaho Sheep and Wool Growers' Association.

ILLINOIS.

Illinois Grain Dealers' Association.  
Illinois Live Stock Breeders' Association.  
Illinois Lumber Dealers' Association.  
Illinois Manufacturers' Association.  
Illinois Millers' State Association.  
Illinois State Grange, Patrons of Husbandry.  
Southern Illinois Millers' Association.  
Travelers' Protective Association of Illinois.  
Anna Fruit Growers' Association.  
Belleville Commercial Club.  
Bloomington Business Men's Association.  
Cairo Board of Trade.  
Chicago Branch, National League of Commission Merchants.  
Chicago Board of Trade.  
Chicago Builders and Traders Exchange.



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Chicago Commercial Exchange.  
Chicago Live Stock Exchange.  
Chicago Merchants' Association.  
Joliet Business Men's Association.  
Quincy Chamber of Commerce.  
Quincy Freight Bureau.  
Quincy Jobbers' Association.  
Quincy Retail Merchants' Association.  
Rockford Business Men's Club.  
Rockford Grocers' Association.  
Rockford Shippers' and Manufacturers' Association.  
Springfield Business Men's Association.

INDIANA.

Indiana Grain Dealers' Association.  
Indiana Hardwood Lumbermen's Association.  
Indiana Millers' Association.  
Indiana Retail Merchants' Association.  
Indiana Shippers' Association.  
Indiana State Board of Commerce.  
Indiana State Grange, Patrons of Husbandry.  
Indiana Wool Growers' Association.  
Shippers' Protective League of Indiana.  
Travelers' Protective Association of Indiana.  
Evansville Business Association.  
Fort Wayne Commercial Club.  
Fort Wayne Retail Merchants' Association.  
Indianapolis Branch, National League of Commission Merchants.  
Indianapolis Board of Trade.  
Indianapolis Commercial Club.  
Indianapolis Fruit and Produce Commission Merchants' Exchange.  
Indianapolis Furniture Manufacturers.  
Lafayette Commercial Club.  
Lafayette Merchants' Association.

IOWA.

Commercial Association of Iowa.  
Corn Belt Meat Producers' Association of Iowa.  
Grain Dealers' Union of Southwestern Iowa and Northwestern Missouri.  
Iowa Grain Dealers' Association.  
Iowa-Nebraska Wholesale Grocers' Association.  
Iowa State Grange, Patrons of Husbandry.  
Iowa State Manufacturers' Association.  
South Dakota, Southwestern Minnesota, and Northwestern Iowa Retail Implement Dealers' Association.  
Burlington Business Men's Club.  
Burlington Commercial Exchange.  
Cedar Rapids Commercial Club.  
Chariton, Noxall Club (The Business Men's Association).  
Davenport Business Men's Association.  
Des Moines Commercial Exchange.  
Dubuque Shippers' Association.  
Oskaloosa Commercial Club.

KANSAS.

Federation of Commercial Interests of Kansas.  
Kansas Grain Dealers' Association.  
Kansas Millers' Association.  
Kansas State Grange, Patrons of Husbandry.  
Kansas Improved Stock Breeders' Association.  
Kansas Wholesale Grocers' Association.  
Southern Kansas Millers' Commercial Club.  
Southwestern Kansas and Oklahoma Implement and Hardware Dealers' Association.  
Arkansas City Commercial Club.

Emporia Business Men's Association.  
Howard Commercial Club.  
Hutchinson Commercial Club.  
Lindsborg Commercial Club.  
Russell Commercial Club.  
Salina Commercial Club.  
Topeka Commercial Club.  
Wellington Business Men's Club.  
Wichita Board of Trade.  
Wichita Chamber of Commerce.  
Wichita Commercial Club.  
Wichita Traffic Bureau.

KENTUCKY.

Travelers' Protective Association of Kentucky.  
Covington Business Men's Club.  
Hartford Commercial Club.  
Louisville Branch, National League of Commission Merchants.  
Louisville Lumbermen's Club.

LOUISIANA.

Mississippi and Louisiana Lumber Dealers' Association.  
New Orleans Branch, National League of Commission Merchants.  
New Orleans Board of Trade.  
New Orleans Live Stock Exchange.  
Ponchatoula Farmers' Association.

MARYLAND.

Baltimore Branch, National League of Commission Merchants.  
Baltimore Chamber of Commerce.  
Baltimore Lumber Exchange.  
Baltimore Travelers and Merchants' Association.  
Baltimore Tobacco Board of Trade.

MASSACHUSETTS.

Massachusetts State Board of Trade.  
Massachusetts State Grange, Patrons of Husbandry.  
Boston Associated Board of Trade (representing 23 affiliated organizations).  
Boston Fruit and Produce Exchange.  
Boston Branch, National League of Commission Merchants.  
Brockton Board of Trade.  
Cambridge Citizens' Trade Association.  
Fitchburg Merchants' Association.  
Haverhill Board of Trade.  
Lowell Builders' Exchange.  
Lowell Board of Trade.  
Mansfield Board of Trade.  
Norwood Business Association and Board of Trade.  
Somerville Board of Trade.  
Worcester Board of Trade.

MICHIGAN.

Michigan Dairymen's Association.  
Michigan Grain Dealers' Association.  
Michigan Hay Association.  
Michigan Merino Sheep Breeders' Association.  
Michigan Retail Lumber Dealers' Association.  
Michigan State Grange, Patrons of Husbandry.  
Michigan State Millers' Association.  
Southern Michigan Fruit Association.  
Albion Farmers' Club.  
Detroit Branch, National League of Commission Merchants.  
Detroit Merchants and Manufacturers' Exchange. (Merged into Detroit Board of Commerce.)  
Grand Rapids Board of Trade.  
Saginaw Lumber Dealers' Association.

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MINNESOTA.

Minnesota Millers' Club.  
Minnesota Municipal and Commercial League (representing over fifty communities).  
Minnesota Retail Grocers and General Merchants' Association.  
Minnesota Retail Hardware Association.  
Minnesota Shippers and Receivers' Association.  
South Dakota and Southwest Minnesota Millers' Club.  
South Dakota, Southwest Minnesota, and Northwest Iowa Retail Implement Dealers' Association.  
Duluth Board of Trade.  
Duluth Commercial Club.  
Duluth Produce and Fruit Exchange.  
Duluth Retail Grocers' Association.  
Duluth Branch, L. S. Retail Meat Dealers' Association.  
Mankato Board of Trade.  
Minneapolis Branch, National League of Commission Merchants.  
Minneapolis Chamber of Commerce.  
Minneapolis Millers' Club.  
Red River Millers' Club, Moorhead. (See North Dakota.)  
Rochester Union, American Society of Equity.  
St. Paul Board of Trade.  
St. Paul Chamber of Commerce.  
St. Paul Commercial Club.  
St. Paul Produce Exchange.  
South St. Paul Live Stock Exchange.  
Winona Board of Trade.

MISSISSIPPI.

Mississippi and Louisiana Lumber Dealers' Association.  
Aberdeen Group Commercial Association, West Point.  
Laurel Board of Trade.  
Natchez Cotton and Merchants' Exchange.  
Vicksburg Cotton Exchange.

MISSOURI.

Grain Dealers' Union of Southwest Iowa and Northwest Missouri.  
Missouri Retail Merchants' Association.  
Missouri Retail Hardware Association.  
Travelers' Protective Association of Missouri.  
Gashland Fruit Growers' Association.  
Jefferson City Commercial Club.  
Kansas City Board of Trade.  
Kansas City Hay Dealers' Association.  
Kansas City Manufacturers and Merchants' Association.  
Kansas City Millers' Club.  
Pierce City Fruit Growers' Association.  
St. Joseph Commercial Club.  
St. Louis Builders' Exchange.  
St. Louis Business Men's League.  
St. Louis Cotton Exchange.  
St. Louis Fruit and Produce Exchange.  
St. Louis Lumber Dealers' Association.  
St. Louis Manufacturers' Association.  
St. Louis Merchants' Exchange.  
St. Louis Millers' Club.  
St. Louis Stove Manufacturers' Association.

MONTANA.

Eastern Montana Wool Growers' Association.  
Montana Stock Growers' Association.  
North Montana Wool Growers' Association.  
Great Falls Retail Merchants' Exchange.

NEBRASKA.

Iowa-Nebraska Wholesale Grocers' Association.  
 Millers' Club of Nebraska.  
 Nebraska Lumber Dealers' Association.  
 Nebraska Retail Merchants' Association.  
 Nebraska Stock Growers' Association.  
 South Nebraska Millers' Club.  
 Fremont Commercial Club.  
 Lincoln Commercial Club.  
 Lincoln Retail Grocers' Association.  
 Omaha Branch, National League of Commission Merchants.  
 Omaha Grain Exchange.  
 Omaha Produce Exchange.  
 South Omaha Live Stock Exchange.

NEW HAMPSHIRE.

New Hampshire State Grange, Patrons of Husbandry.

NEW JERSEY.

New Jersey Lumbermen's Protective Association.  
 New Jersey State Grange, Patrons of Husbandry.  
 Jersey City Board of Trade.  
 Newark Board of Trade.

NEW MEXICO.

Las Vegas Commercial Club.

NEW YORK.

New York State Fruit Growers' Association.  
 New York State Grange, Patrons of Husbandry.  
 New York State Millers' Association.  
 New York State Retail Lumber Dealers' Association.  
 Albany Chamber of Commerce.  
 Auburn Business Men's Association.  
 Brooklyn, United Retail Grocers' Association.  
 Buffalo, Black Rock Manufacturers' Association.  
 Buffalo Branch, National League of Commission Merchants.  
 Buffalo Chamber of Commerce.  
 Buffalo Lumber Exchange.  
 Jamestown Manufacturers' Association.  
 Lockport Board of Trade.  
 Middletown Business Men's Association.  
 New York Cotton Exchange.  
 New York Fruit and Produce Trade Association.  
 New York Lumber Trade Association.  
 New York Manufacturers' Association.  
 New York North Side Board of Trade.  
 New York Stationers' Board of Trade.  
 Rochester Chamber of Commerce.  
 Utica Chamber of Commerce.

NORTH CAROLINA.

North Carolina Pine Association (comprising North and South Carolina and Virginia).  
 Charlotte Shippers' Association.  
 East Carolina Truck and Fruit Growers' Association, Wilmington.  
 Wilmington Chamber of Commerce.  
 Wilmington Merchants' Association.

NORTH DAKOTA.

Red River Millers' Club (comprising North Dakota and northwest Minnesota).

OHIO.

Miami Valley and Western Ohio Grain Dealers' Association.  
 Middle Ohio Grain Dealers' Association.  
 Northwest Ohio Grain Dealers' Association.  
 Northwest Ohio Millers and Grain Dealers' Association.  
 Ohio Shippers' Association.  
 Ohio Grain Dealers' Association.  
 Ohio Millers' State Association.  
 Ohio State Association, Patrons of Industry.  
 Ohio State Grange, Patrons of Husbandry.  
 Ohio State Hardware Association.  
 Western Ohio Grain Dealers' Association.  
 Cincinnati Chamber of Commerce.  
 Cincinnati Business Men's Club.  
 Cincinnati Lumbermen's Club.  
 Cincinnati Manufacturers' Club.  
 Cincinnati Receivers and Shippers' Association.  
 Cleveland Chamber of Commerce.  
 Cleveland Retail Coal Dealers' Association.  
 Columbus Board of Trade.  
 Dayton Commercial Club.  
 Massillon Board of Trade.  
 Newark Board of Trade.  
 Portsmouth Board of Trade.  
 Sandusky Chamber of Commerce.  
 Toledo Builders' Exchange.  
 Toledo Produce Exchange.  
 Youngstown Builders' Exchange.

OKLAHOMA.

Oklahoma Chamber of Commerce, Oklahoma City.  
 Oklahoma Live-Stock Association.  
 Oklahoma Millers' Association.  
 Oklahoma Traffic Association.  
 Southwest Kansas and Oklahoma Implement and Hardware Dealers' Association.

OREGON.

Oregon Live-Stock Breeders' Association.  
 Portland Board of Trade.  
 Portland Chamber of Commerce.  
 Portland Manufacturers' Association of the Northwest.

PENNSYLVANIA.

Pennsylvania Lumberman's Association.  
 Pennsylvania Millers' State Association.  
 Pennsylvania State Grange, Patrons of Husbandry.  
 Philadelphia Board of Trade.  
 Philadelphia Bourse.  
 Philadelphia Commercial Exchange.  
 Philadelphia Commercial Museums.  
 Philadelphia Hardware Merchants and Manufacturers' Association.  
 Philadelphia Lumbermen's Exchange.  
 Philadelphia Manufacturers' Club.  
 Philadelphia Produce Exchange.  
 Philadelphia Trades League.  
 Pittsburgh Chamber of Commerce.  
 Pittsburgh Grain and Flour Exchange.  
 Pittsburgh Branch, National League of Commission Merchants.  
 Pittsburgh Wholesale Lumber Dealers' Association.  
 Reading Board of Trade.  
 Scranton Board of Trade.

RHODE ISLAND.

Lumber Dealers' Association of Rhode Island.  
Rhode Island State Grange, Patrons of Husbandry.  
Pawtucket Merchants' Association.  
Pawtucket, Southern Woodlawn Improvement Society.

SOUTH CAROLINA.

North Carolina Pine Association (comprising North and South Carolina and Virginia).  
Anderson Chamber of Commerce.  
Charleston Bureau of Freight and Transportation.  
Charleston Chamber of Commerce.  
Charleston Commercial Club.  
Charleston Cotton Exchange.  
Columbia Chamber of Commerce.  
Gaffney Business Men's Club.  
Georgetown Board of Trade.  
Piedmont Wholesale Grocers' Association, Anderson.  
Spartanburg Chamber of Commerce.

SOUTH DAKOTA.

South Dakota and Southwestern Minnesota Millers' Club.  
South Dakota, Southwestern Minnesota, and Northwestern Iowa Retail Implement Dealers' Association.  
Western South Dakota Stock Growers' Association.  
Deadwood Business Club.

TENNESSEE.

Chattanooga Retail Grocers' Association.  
Memphis Builders' Exchange.  
White County Live Stock Association, Sparta.

TEXAS.

Texas Cattle Raisers' Association.  
Texas Cotton Growers' Association.  
Texas Grain Dealers' Association.  
Texas Live Stock Association.  
Texas Lumbermen's Association.  
Texas Millers' Association.  
Travelers' Protective Association of Texas.  
Dallas Commercial Club.  
Dallas Freight Bureau.

UTAH.

Utah Live Stock Association.  
Utah Wool Growers' Association.  
Ogden, Weber Club (The Business Men's Association).

VERMONT.

Vermont Jersey Cattle Club.  
Vermont State Grange, Patrons of Husbandry.  
Vermont Sugar Makers' Association.

VIRGINIA.

North Carolina Pine Association (comprising North and South Carolina and Virginia).  
Danville Commercial Association.  
Danville Tobacco Association.  
Richmond Branch, National League of Commission Merchants.  
Richmond Tobacco Exchange.

## WASHINGTON.

Eastern Washington and Northern Idaho Lumber Manufacturers' Association.  
 Washington State Grange, Patrons of Husbandry.  
 Chewelah Commercial Club.  
 Colville Commercial Club.  
 Dayton Commercial Association.  
 Franklin County Chamber of Commerce, Pasco.  
 Grays Harbor Commercial Club, Cosmopolis.  
 Republic Chamber of Commerce and Mines.  
 Ritzville Chamber of Commerce.  
 Seattle Manufacturers' Association.  
 Spokane Chamber of Commerce.  
 Spokane Jobbers and Shippers' Association.  
 Spokane Lumbermen's Association.  
 Tacoma Chamber of Commerce and Board of Trade.  
 Tacoma Retail Grocers' Protective Association.  
 Walla Walla Commercial Club.

## WEST VIRGINIA.

Charlestown Board of Trade.

## WISCONSIN.

Wisconsin Cheese Makers' Association.  
 Wisconsin Grain Dealers' Association.  
 Wisconsin Retail Hardware Association.  
 Wisconsin Retail Lumber Dealers' Association.  
 Wisconsin State Grange, Patrons of Husbandry.  
 Wisconsin State Millers' Association.  
 La Crosse Board of Trade.  
 La Crosse Manufacturers and Jobbers' Union.  
 Marinette General Improvement Association.  
 Marinette County Good Roads Association.  
 Milwaukee Association of Steam and Hot Water Heating Engineers.  
 Milwaukee Branch, National League of Commission Merchants.  
 Milwaukee Builders and Traders' Exchange.  
 Milwaukee Chamber of Commerce.  
 Milwaukee Merchants and Manufacturers' Association.  
 Milwaukee Millers' Association.  
 Milwaukee Retail Grocers' Association.  
 Muscoda Dairy Board, Spring Green.  
 Peshtigo Good Roads Association.  
 Superior Retail Grocers' Protective Association.

## WYOMING.

Colorado and Wyoming Lumber Dealers' Association.  
 Eastern Wyoming Wool Growers' Association.  
 Saratoga Board of Trade.

The legislatures of the following States have memorialized Congress within the past two years to enact legislation of similar character, viz: Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, South Dakota, Wisconsin.

|   |            |
|---|------------|
| National and sectional organizations .....                                  | 62         |
| State and local organizations, representing 44 States and Territories ..... | 401        |
| <b>Total</b> .....  | <b>463</b> |
| State granges, Patrons of Husbandry .....                                   | 17         |
| <b>Aggregate</b> .....  | <b>480</b> |

The State and local organizations enumerated in the foregoing, including 17 State granges of the Patrons of Husbandry, are situated as follows:

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|                      |    |                                  |     |
|----------------------|----|----------------------------------|-----|
| Alabama              | 5  | New York                         | 22  |
| Arkansas             | 9  | North Carolina                   | 4   |
| California           | 32 | North Dakota                     | 1   |
| Colorado             | 13 | Ohio                             | 27  |
| Connecticut          | 4  | Oklahoma                         | 4   |
| District of Columbia | 1  | Oregon                           | 4   |
| Georgia              | 5  | Pennsylvania                     | 18  |
| Idaho                | 2  | Rhode Island                     | 4   |
| Illinois             | 27 | South Carolina                   | 10  |
| Indiana              | 20 | South Dakota                     | 4   |
| Iowa                 | 13 | Tennessee                        | 3   |
| Kansas               | 20 | Texas                            | 9   |
| Kentucky             | 5  | Utah                             | 3   |
| Louisiana            | 4  | Vermont                          | 3   |
| Maryland             | 5  | Virginia                         | 4   |
| Massachusetts        | 15 | Washington                       | 15  |
| Michigan             | 13 | West Virginia                    | 1   |
| Minnesota            | 21 | Wisconsin                        | 20  |
| Mississippi          | 4  | Wyoming                          | 2   |
| Missouri             | 20 |                                  |     |
| Montana              | 4  | Total                            | 418 |
| Nebraska             | 12 | National and sectional organiza- |     |
| New Hampshire        | 1  | tions                            | 62  |
| New Jersey           | 4  |                                  |     |
| New Mexico           | 1  | Aggregate                        | 480 |

WASHINGTON, D. C., January 25, 1905.

Hon. W. P. HEPBURN,

*Chairman Committee on Interstate and Foreign Commerce,*

*House of Representatives, Washington, D. C.*

SIR: In support of the oral statement which I made before your committee this afternoon, to the effect that the net earnings of many of the railways of the country have produced a return on the capital stock of the several companies ranging from 10 to 20 per cent, I beg leave to present the following detailed statement showing the percentage on the capital stock of the railway companies mentioned produced by the net earnings of the companies mentioned after paying fixed charges, including taxes and interest on outstanding bonds, during the years ending June 30, 1902 and 1903, as reported in the Wall Street Journal, a daily newspaper published in the city of New York, devoted especially to financial interests. I also include several companies whose net earnings have produced a return of between 7 and 10 per cent on their capital stock during the years mentioned. In cases where blanks occur, the return is not given in the journal mentioned.

|  | 1902.       |           | 1903.       |           |
|--|-------------|-----------|-------------|-----------|
|  | Pre-ferred. | Com-mon.  | Pre-ferred. | Com-mon.  |
|  | Per cent.   | Per cent. | Per cent.   | Per cent. |
| Atchison, Topeka and Santa Fe              | 5           | 9.66      | 5           | 8         |
| Atlantic Coast Line                        | 5           | 9.4       | 5           | 7.93      |
| Baltimore and Ohio                         |             |           | 4           | 10.23     |
| Buffalo, Rochester and Pittsburg           | 10.52       | 10.52     | 12.4        | 12.4      |
| Central of New Jersey                      |             |           |             | 7.78      |
| Chicago and Eastern Illinois               | 6           | 14.4      | 6           | 23.5      |
| Chicago and Northwestern                   | 14.6        | 14.6      | 14.6        | 14.6      |
| Chicago, Indianapolis and Louisville       | 4           | 6.53      | 4           | 7.75      |
| Chicago, Milwaukee and St. Paul            | 9.19        | 9.19      | 9.9         | 9.9       |
| Chicago, Rock Island and Pacific           |             | 12        |             | 8.2       |
| Chicago, St. Paul, Minneapolis and Omaha   |             |           | 16.49       | 9.49      |
| Hocking Valley                             | 6.56        | 6.56      | 7           | 7         |
| Illinois Central                           |             | 12.36     |             | 11.29     |
| Lehigh Valley                              |             |           | 10          | 4.9       |
| Louisville and Nashville                   |             |           |             | 10.35     |
| Minneapolis and St. Louis                  | 5           | 8.27      | 5           | 5.3       |
| Minneapolis, St. Paul and Sault Ste. Marie | 7           | 7.83      | 7           | 7         |
| Missouri Pacific                           |             | 8.45      |             | 10        |
| Mobile and Ohio                            |             |           |             | 14        |
| New York, New Haven and Hartford           |             | 8.71      |             | 8.34      |
| Norfolk and Western                        | 4           | 6.96      | 4           | 8         |
| Pacific Coast                              |             |           | 5           | 10.6      |
| Pennsylvania Railroad                      |             | 12.3      |             | 9.2       |
| Philadelphia and Erie                      | 7           | 4.20      | 7           | 7.87      |
| Union Pacific                              |             |           | 4           | 10.40     |



The dividends declared by the several companies mentioned have in most cases been less than, and in some cases very much less than, the percentage earned as shown in the above figures, the surplus having been applied in some cases to betterments and permanent improvements, and in other cases to an accumulated surplus fund. The aggregate amount of such surplus fund accumulated by all the railways of the United States during the four years ending June 30, 1903, as shown in the annual reports on railway statistics of the Interstate Commerce Commission, amounts to \$358,440,000. The amount reported as having been expended for permanent improvements during that period (when not included in operating expenses) was \$92,500,000. This amount added to the accumulated surplus makes an aggregate of \$450,940,000 derived from the net earnings of the railways of the country, in addition to the dividends declared and paid to stockholders.

Respectfully submitted.

E. P. BACON.

**STATEMENT OF H. B. MARTIN, OF NEW YORK, NATIONAL SECRETARY OF THE AMERICAN ANTI-TRUST LEAGUE.**

MR. CHAIRMAN AND GENTLEMEN OF THE COMMITTEE: In view of the short time at the disposal of the committee I respectfully ask permission to file a brief statement on behalf of the American Anti-Trust League and numerous commercial and agricultural organizations, including shippers, consumers, and producers from many States, who have presented petitions to Congress urging the enactment of H. R. 13778, the bill amending the interstate-commerce law, introduced by Representative Hearst, of New York.

The organizations and citizens who indorse the Hearst bill and urge its passage do so for the following reasons among others:

First. Because the bill empowers the Commission to fix freight rates when existing rates have been found by it to be unreasonable or discriminating.

Second. It prohibits change of rates without thirty days' notice to the Commission.

Third. Makes all its orders effective within thirty days after service and requires the Commission to decide every case within sixty days after it is closed.

Fourth. Unlike all other bills, it makes the execution of the law effective and expeditious by creating an interstate-commerce court, with exclusive jurisdiction to review all orders of the Commission and power to enforce them by contempt proceedings.

Fifth. This does away with double trials, and limits stays to cases found on hearings to be clearly unjust.

Sixth. No appeal lies to the Supreme Court unless either the commerce court or the Supreme Court certifies that a constitutional question is involved which ought to be reviewed, in which cases, however, no stay can be granted.

Seventh. It empowers the Commission to fix classification of freights that will be just and fair to all persons.

The opposition to this legislation regulating rates, as formulated by the railroad owners and their representatives, has substantially resolved itself to this:

They claim—

First. That Congress has no right to delegate to the Interstate Commerce Commission the power to fix rates.

Second. That Congress has no right to delegate to the courts the power to fix rates.

Third. That Congress itself can not fix railroad rates.

Fourth. Their logical conclusion and consistent contention is that the railroad managers alone have the right to fix rates, and thereby to fix the value of all the billions of dollars worth of movable property owned by the 80,000,000 people of the United States, who would thus be helpless in the hands of the few who own the highways.

Are the Interstate Commerce Committees of the House and Senate willing to accept this conclusion?

Is Congress itself willing to accept it?

Are the sovereign people of the United States willing to accept it?

The self-evident answer to these questions and to the untenable claims of the railroad managers is most emphatically "No."

The present system of private management of those great public highways, the interstate railroads, has been tried in the balance and found wanting. The

abuses which have attended the system from the beginning to the present have become so aggravated that they are now intolerable, and the people are determined that a change must be made.

The power to fix the rates of transportation for the property and persons of 80,000,000 of people is too great a power to be safely trusted in the hands of any small clique of private individuals. This much is certain and settled in the mind of most intelligent American citizens outside the ranks of those who serve or share the railroad monopoly.

Every man's property, every man's labor, every man's livelihood, every man's hope of the future is at the mercy of the men who, with an eye solely to the increase of their own wealth and power, now control the public highways in derogation of public rights and in defiance of public law. This is a condition that can not and will not long be endured by the people.

There is a remedy for these evils arising from the private monopoly of the public highways. It is the high privilege, prerogative, and duty of this Congress of the United States to find and apply that remedy before the disease becomes too deep rooted to be removed.

It is also the privilege and duty of the citizens to suggest and to petition to Congress for the adoption of the reforms needed to cure the evils complained of.

To this end we have here presented to this committee and to Congress numerous petitions signed by many citizens, both shippers and consumers, from all parts of the United States in favor of the enactment into law of bill H. R. 13778, known as the "Hearst bill."

\* \* \* \* \*

The objections against this line of legislation provided for in H. R. 13778, which are presented by the railroad men and their friends, are as I have before stated:

First. Because they claim it is unconstitutional for Congress to delegate its legislative power to fix rates to the Interstate Commerce Commission, a body appointed by the President, and thereby conferring the legislative power on the executive branch of the Federal Government and is unconstitutional. This is sufficiently answered by the decisions of the United States Supreme Court to the effect that the Commission is a legislative body and that Congress can delegate the rate-making power to it.

Second. Because they claim that the courts, by virtue of the provision allowing appeals from the orders of the Commission, would be in fact allowed to fix the rate, and that would be delegating a legislative power to the judicial branch of the Government and thereby disturbing the balance of powers between the legislative and judicial branches.

The sufficient answer to this is that all legislative acts are subject to judicial review as to their constitutionality; but that does not necessarily mean that Congress thereby delegates to the courts any part of its proper legislative power.

Third. They claim that Congress itself, although empowered to make rates, can not do so, because it is too complex a subject to be dealt with properly by so large a body of men, inexperienced in railroad affairs.

A sufficient answer to this is the fact that a Congress competent to enact so complicated a thing as a customs-tariff schedule is certainly qualified to enact a railroad freight and passenger schedule.

This argument and the fourth argument of the railroad managers, viz, that they alone are competent to fix just and reasonable freight and passenger rates, is akin to the old argument of the friends of monarchy and nobility, viz, that only the wealthy and well born are competent to govern. That all question of Government were, as the railroad managers now claim the rate question is, too deep and too complicated to be dealt with by the common people and their representatives in Congress. The claims of the monarchist proved to be utterly absurd; and the common sense of the people to-day emphatically repudiates the equally absurd claim to superior wisdom and virtue on the part of the railroad managers.

The fixing of just and reasonable rates is not so complex a matter as they would have us believe. It is the making of unjust discrimination and extortionate rates that is the complex and complicated things.

"It is the tangled web they weave  
When first they practice to deceive"

that makes the rate-making business look so complicated.

## 406 PROPOSED AMENDMENT OF INTERSTATE-COMMERCE LAW.

Ample evidence has been furnished to this committee and to Congress and to the United States Industrial Commission and the Interstate Commerce Commission of the enormous and dangerous abuses of the power to fix rates and control the rail highways when that power is exercised by the private individuals now owning and managing the roads.

That Government regulation of railroads must come is now admitted even by some of the representatives of the railway companies themselves who have appeared before this committee.

But they claim that by enforcing the existing interstate-commerce law all the evils of importance would be wiped out. From this opinion we emphatically dissent.

The abuses carried on through the manipulation of freight classifications would not be abolished by enforcing the existing interstate-commerce law.

The unfair advantage which the railroads have over the shipper and consumer through the almost intermediate delays by long-drawn out trials and appeals under the present system would not be abolished by the enforcement of the present law.

The private-car abuse is not reached through the present law.

A hundred different forms of outrageous secret discrimination and rebates are not reached by the existing law.

And above all, the giant evil of unjust, unfair, unreasonable, and extortionate rates can not be abolished by the enforcement of existing interstate-commerce law. The remedy for all these evils is more comprehensively and effectively provided in the Hearst bill than in any other bill now before Congress.

There has been much testimony and argument presented before this committee in behalf of the shippers and in behalf of the railroad companies; but there is another party besides these two, who is most vitally interested in Government regulation and control of railroads to the end that the admitted abuses and extortion I have enumerated should be put a stop to, and that party is the great body of 80,000,000 producers and consumers, on whom the whole burden of railroad freight and passenger charges finally falls.

It is in behalf of the 80,000,000 of unjustly overburdened consumers that I speak to-day.

That the burden so unjustly imposed on them by the railroads is very grievous is clear to everyone when we consider that the tax in the form of railroad rates levied each year now amounts to about nineteen hundred millions of dollars. Approximately one-half of this, or nearly ten hundred millions, is clear profit to the railroad owners, and over five hundred millions of that profit is an excessive and extortionate charge.

This is an injustice so great as to be intolerable. Congress can and should put a stop to it.

When the private owners and managers of the railroads proceed to such lengths as this, in usurping the power to tax the citizens, it becomes the imperative duty of Congress to enact a law that will relieve the people of this enormous and unjust burden.

Not only do the railroads themselves levy this monopoly extortion of five hundred millions a year, but by the favoritism which they show to certain individuals and corporations they have built up numerous monopolistic trusts, who, as soon as they have secured control of the markets, proceed to levy another monopoly tax on the consumers almost as burdensome and more oppressive and ruinous than even the exactions of the railroads.

Fortunately for the nation, President Roosevelt, by the statements in his last message, shows that the people have reason to hope that the executive branch of the Government is ready to actively cooperate with Congress in remedying these evils by the enactment of the new laws so greatly needed to control the railways and correct their abuses.

There have been many examples furnished your committee by many witnesses of cases of unjust and unreasonable rates.

A typical case affecting directly the people of the National Capital and making the United States Government itself a victim is the rate on soft coal from points in West Virginia. I am informed that the rate from McDowell County points to Shenandoah Junction, about 200 miles, is \$1.60 per ton; from Shenandoah Junction to Washington, 60 miles, is also \$1.60 per ton, over 300 per cent higher. This is effective in keeping out competing coal that would, if the rate were fair, greatly reduce the cost of coal to all the consumers in Washington, including the Government itself.

To allow, as we have done, a few private individuals to secure absolute control of the main highways of the nation is to create an autocracy within the Republic which has already become more powerful than the Republic itself. Indeed, it is the common understanding in Washington to-day that the railroads will allow no bill to pass which does not suit them. A prominent Government official, testifying before the Senate committee a short time ago, said, "You can not pass any bill regulating the railroads without the railroads' consent, and they will not consent."

The result of private control of railroads is commercial despotism. They defy the Government, disobey the laws, and enforce their own decrees with ruthless disregard of the rights of both shippers and consumers.

Railroad tariffs are both legally and essentially a tax levied on the whole people. In 1903 that tax levied on the nation by this handful of private individuals amounted to eighteen hundred and ninety million dollars—three times the amount of all the taxes levied by the Government of the United States.

In the language of ex-Governor Larrabee, of Iowa:

"Other tax laws of the United States are not changed, even in the slightest degree, without months of discussion by Congress, and after thorough investigation of all interests likely to be affected by the change; but this great transportation tax can be increased by this handful of men between two days, and is often so done without any consultation with those who are compelled to pay it, or any consideration for their interests.

"Nowhere else in the civilized world are a few irresponsible persons permitted to carry on a large public business like this, or vested with such tremendous powers of taxation without severe restrictions being placed upon them."

H. B. MARTIN,

1229 Pennsylvania Avenue NW., Washington, D. C.

#### STATEMENT BY JOSEPH NIMMO, JR., STATISTICIAN AND ECONOMIST.

JANUARY 19, 1905.

MR. CHAIRMAN: Mr. G. Waldo Smith, of the New York Board of Trade and Transportation, who appeared before this committee on Tuesday the 17th instant, presented a petition from that board, in which was recommended "a joint special commission of Congress on interstate commerce to thoroughly investigate all problems involved, and to report their conclusions and recommendations by bill at the opening of the next Congress."

This is a subject in which I am deeply interested. I have for years urged the importance of such a Congressional investigation upon the trade bodies of the country and in the public press. Perhaps the most explicit of these recommendations is the one made in the *Railway Age* of January 31, 1902, from which I quote the following:

"It is somewhat astonishing that there has been but one such investigation as that here recommended since the advent of railroad transportation in this country, namely, the investigation of 1896. Since that time important changes have taken place in economic and commercial conditions of controlling force.

"We may profit very much in regard to this important subject from the example of Great Britain. The British Parliament began the investigation of the peculiar commercial, economic, and political aspects of tramways in the year 1801—more than one hundred years ago. Since the advent of steam railroads, about the year 1830, there have been many parliamentary investigations in Great Britain concerning the relations of the railroads to the public interests. The most notable of these were the investigations of 1840, 1844, 1846; 1852, 1865, 1872, 1881, 1888, and 1893-94. The printed report of the Commission of 1872 is a quarto volume of 1,189 pages, nearly as large as a Webster's Dictionary. The report of 1893-94 is also a quarto volume of nearly 700 pages. In these various reports all the more important commercial, economic, and political conditions governing the railroad transportation question in Great Britain have been investigated and reported upon. Theories and notions about railroad management and regulations have also been considered and reported upon—some of them quite as visionary and as absurd as certain of those which now command public attention in this country. As the result of these elaborate parliamentary inquiries, abuses of various sorts have been abated, mistaken ideas in regard to the management and regulation of the railroads of Great Britain have been cor-

rected, sensible remedial expedients have been adopted, many questions at issue have been amicably settled, and public discontent has been allayed. Thus, British statesmen, following the historic example of their illustrious predecessors, have from time to time, in the language of Mr. Gladstone, 'submitted themselves to the lessons of experience and to the lessons of the hour.'

"How different has been the course pursued toward the railroads of this country by our National Government. With an area (exclusive of Alaska and our insular possessions) twenty-five times that of the United Kingdom of Great Britain and Ireland, and with a railroad mileage of over 200,000 miles as against 22,000 miles in Great Britain, as before stated, we have had only one Congressional investigation of the railroad question, namely, the Senate inquiry of 1886, which resulted in the interstate-commerce act of February 4, 1887.<sup>a</sup> That investigation related to the cure of certain causes of complaint. What is now needed is an inquiry relating to the organization of our vast American railroad system, its relationships to the social, commercial, and industrial interests of the country, the benefits which it has conferred, the evils which have incidentally arisen in the course of its development, and the proper course to be pursued in the attempt to cure those evils. This appears to be the supreme duty of the hour. It is a duty which can not be evaded if legislation in regard to the most important material interests of this country is to be based upon the certain lessons of experience, and not upon the uncertain leadings of public clamor.

"If the eminently wise and wholesome example of Great Britain is to be followed the proposed inquiry will involve many hundred and even thousands of inquiries. Without any attempt to formulate a definite scheme of investigation, I submit, offhand, some of the topical features of such a Congressional investigation."

[Here follow thirty-six specific inquiries relating to the economy of transportation by rail and the relations of the railroads to the general public interests, but which need revision in order to meet changed conditions.—N.]

In view of the fact that the commercial, economic, and constitutional aspects of such Congressional inquiry as that here recommended have been pretty thoroughly discussed at the present hearings, I shall invite your attention only to certain inquiries bearing upon fundamental principles of our form of Government, which inquiries, in my judgment, relate to the most important aspect of the whole question at issue. The nature and scope of these inquiries are indicated as follows:

In order to avoid the slightest misrepresentation as to the attitude assumed by the Interstate Commerce Commission, I quote the following from page 10 of its seventh annual report, dated December 1, 1893:

"To give each community the rightful benefit of location, to keep different commodities on an equal footing, so that each shall circulate freely and in natural volume, and to prescribe schedule rates which shall be reasonably just to both shipper and carrier is a task of vast magnitude and importance. In the performance of that task lies the great and permanent work of public regulation."

The Utopian idea of placing the conduct of the commercial and transportation interests of this country under the supervision and control of an administrative bureau of the National Government constitutes a striking illustration of what is commonly meant by "bureaucratic government."

During the last two thousand years there has been going on among the foremost nations of the globe a struggle between the advocates of dispensing justice in the conduct of the interaction of commercial and industrial forces through the exercise of the judicial power and through the exercise of autocratic administrative authority, the latter function being usually performed by a bureau clothed with executive authority or with delegated legislative authority. This latter method—bureaucracy—was the potential cause of the downfall of the Roman Empire. The only civilized country in which it now prevails as an unrestrained expression of governmental authority is Russia, where the people are to-day clamoring for its suppression, for the reason that it constitutes an intolerable form of despotism. In England the autocratic exercise of the power of controlling the course of the development of the commercial and industrial interests of the country by autocratic governmental authority was known as a "dispensing power." This form of despotism was abolished as the result

<sup>a</sup> The Windom Senate committee report of 1873 was essentially the result of an inquiry in regard to the construction or improvement of certain water routes.

of the British revolution of 1688. The men who framed our present form of government utterly repudiated any form of autocratic power. But, ever and anon, men oblivious to the lessons of the political experiences of the civilized nations of the globe during the last two thousand years announce in this and in other countries some new scheme for placing the commercial and industrial interests of the people under bureaucratic rule. This is the controlling idea of the Quarles-Cooper bill.

In view of the foregoing, I desire to express the earnest hope that this committee will perceive the present importance of a thorough Congressional investigation of the railroad transportation question and that it may be led to institute such inquiry in all its political, commercial, and economic bearings.

For thirty years as officer of the Government, and in my private capacity as statistician and economist, I have been a laborious investigator of the railroad problem in this country, and that experience has impressed me with a sense of the importance of an investigation of the subject by a Congressional committee clothed with all the powers which the governmental authority confers for the discovery of facts not accessible to the private citizen.



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